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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1360

LEO BRAMSON and MARVIN WELFELD, individually and as Trustees for themselves and the limited partners of Chiglades Farm, Ltd., *Petitioners*

v.

EARL L. BUTZ, Secretary of Agriculture, *et al.*, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, Appendix A, pp. 1a-16a, *infra,* is reported at 485 F.2d 1125. The opinion of the District Court for the Southern District of Florida, Appendix B, pp. 17a-34a, *infra,* is reported at 346 F. Supp. 934. The opinion of the Secretary of Agriculture, Appendix C, pp. 35a-72a, *infra,* is not reported.

JURISDICTION

The opinion and judgment of the court of appeals were filed on October 10, 1973. On December 26, 1973, Mr. Justice Powell granted an order extending the time to file a petition for writ of certiorari to and including February 7, 1974. On February 6, 1974, the time was further extended to and including March 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's Marketing Order for "Celery Grown in Florida" (7 C.F.R. Part 967), which is virtually identical to a Florida state celery marketing program found unconstitutional by the Florida Supreme Court in 1965 because it granted "a virtual monopoly" on celery production to large established celery farmers, is authorized by the Agricultural Marketing Agreement Act of 1937, which permits the Secretary only to regulate the quantities of an agricultural product that "handlers" may purchase from producers (7 U.S.C. § 608c(6)(B)) and forbids any regulation of "any producer in his capacity as a producer" (7 U.S.C. § 608c(13)(B)).

2. Whether the Secretary of Agriculture's failure to give any consideration whatever to the antitrust consequences of the regulation imposed by his Marketing Order for "Celery Grown in Florida" invalidates that Marketing Order in view of the antitrust immunity conferred on such orders by the Agricultural Marketing Agreement Act of 1937 and the fact that this particular order perpetuated the monopoly previously given to giant Florida celery producers.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Agricultural Marketing Agreement Act of 1937 and the Marketing Order for Celery Grown in Florida appear at Appendix D, pp. 73a-80a, *infra*.

STATEMENT

Until May 1965, celery production in Florida was regulated under a state marketing program which assigned permanent quotas called "base quantities" to producers of celery who had been in the business between 1960 and 1962. That method of regulation was challenged in the Florida courts, and on May 5, 1965, the Supreme Court of Florida decided in *Rabin* v. *Conner*, 174 So. 2d 721 (reprinted as Appendix E, pp. 81a-90a, *infra*) that such a system violated the due process and equal protection clauses of the Florida and United States constitutions. The Florida Supreme Court held that the effect of the "base quantity" system was "to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny any other persons the right to participate in this lawful enterprise on any reasonably large scale basis, and to deny others the right to participate at all." 174 So. 2d at 725. The court observed that the effect of the regulation was "to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not," and that this distinction, which had "no justification in any legitimate public policy," provided "no real opening for new producers." *Ibid.* The court also noted that the Florida regulation which it was invalidating "seems to regulate only the producers of celery, no direct at-

tempt to regulate handlers or distributors being made . . . ." *Ibid.*

On July 9, 1965, approximately two months after the Florida Supreme Court's decision, the Secretary of Agriculture published in the *Federal Register* a "Proposed Marketing Agreement and Order" pursuant to the Agricultural Marketing Agreement Act which substantially tracked the invalidated state scheme. 30 *Fed. Reg.* 8684. Public hearings were held between July 28 and 30, 1965; and on October 25, 1965, a decision rejecting all objections and directing implementation of the proposed order was published. 30 *Fed. Reg.* 13708. The decision did not refer, in any way, to the Florida court's conclusion that the state system assigned "a virtual monopoly" to existing producers and did not discuss antitrust policy at all. It did recognize, however, in its description of the federal regulations, that "[t]he same method in principle was used under the State marketing program for apportioning producer and handler equities in the total Marketable Quantity for each of the past four seasons." 30 *Fed. Reg.* at 13714. The federal Marketing Order took effect on November 13, 1965 (30 *Fed. Reg.* 14266), and it assigned permanent quotas or "base quantities" on the basis of "production history" between 1958 and 1965.

Petitioners in this proceeding are the trustees of a limited partnership ("Chiglades Farm, Ltd.") which was established in 1962, during the pendency of the State system of regulation, to grow and market celery. During the growing seasons between 1962 and 1967, the partnership grew and marketed celery under the quota or "base quantity" of a corporation that had been assigned the rights of a Florida farmer who had

grown substantial celery in 1958 and 1959. Because the petitioners, who were the general partners of Chiglades Farm, Ltd., concluded in 1966 and 1967 that they had been deceived by the individual who was the president and principal stockholder of the corporation holding the "base quantity," they terminated their relationship with the corporation and sought to produce and market celery in the partnership's name. In the spring of 1967 and again in 1969, the partnership submitted applications to the Florida Celery Committee requesting that it be allowed to farm and market celery. In 1967, the application was denied because the partnership held no quota or "base quantity" of its own (R. 1167-1173),[1] and the Florida Celery Committee decided—as it has consistently since the federal program was instituted—not to establish a "reserve" quota for new producers.

This proceeding was begun administratively by an application submitted in May 1969 to the Florida Celery Committee for assignment of a "base quantity" (R. 1152-1160). Chiglades Farm maintained that an examination of the true facts regarding production of celery between 1962 and 1967 would show that the partnership, rather than the corporation that owned the quota, was the true producer of the celery. Evidentiary hearings were held in June and July 1969 on this factual contention and proposed findings were submitted by an Agriculture Department hearing examiner, which were accepted in part and rejected in part by the Florida Celery Committee (R. 1643-1722).

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[1] "R" refers to the original record prepared for the court of appeals which is being transmitted to this Court at the request of counsel for petitioners.

The Committee's decision was appealed to the Secretary of Agriculture, who affirmed (R. 1724-1791).

On October 19, 1970, this action was begun in the United States District Court for the District of Columbia contesting the factual determination of the Secretary and the legal conclusions that had sustained the Marketing Order against the partnership's challenge (R. 326).[2] The complaint alleged, in addition to Chiglades' factual claim to a "base quantity," that the Marketing Order was invalid because it excluded new farmers and thereby restrained trade and because it exceeded the authority granted to the Secretary of Agriculture by Congress. On the motion of the federal defendants, who claimed that the Florida corporation which owned the quota was a necessary party and could not be joined in the District of Columbia, the action was transferred to the Southern District of Florida. On cross-motions for summary judgment based on the administrative record, the district court entered judgment for the defendants. In addition to rejecting the factual claims, the judge ruled that the Marketing Order imposed only "indirect" regulation on producers and that such regulation is not prohibited by the Act (R. 2005-2006, pp. 28a-29a, *infra*). He also concluded that the Secretary of Agriculture's failure to consider antitrust consequences did not invalidate the Order since "[t]he antitrust exemption provided by 7 U.S.C. § 608b is

[2] In two companion actions before the Secretary, the partnership had contended, *inter alia*, that the Marketing Order "discriminates against farmers who did not hold Base Quantities prior to November 1965," that the Marketing Order perpetuated "an illegal State program" and failed "to protect the interest of the consumer" and that the order did not comply with Section 8c(6)(B) of the Agricultural Marketing Agreement Act (R. 1749).

clear, unequivocal and unlimited. No prior determination by the Secretary of possible anti-competitive effects is required" (R. 2004, p. 27a, *infra*).

The court of appeals affirmed. It held that since the Order purported to regulate only the marketing of produce, it affected "production only indirectly" (p. 11a, *infra*). This, in its view, was consistent with the objective of the Agricultural Marketing Agreement Act of 1937. With respect to the contention that antitrust policies were ignored by the Secretary, the court of appeals, apparently misunderstanding the argument, said: "Plaintiffs maintain that, insofar as Marketing Order No. 967 exceeds its statutory authority, this antitrust immunity [of 7 U.S.C. § 608b] is inapplicable. Having found no abuse of authority, however, we must conclude that the immunity is undisturbed. Where such total immunity is granted, there can be no violation of the antitrust laws. See *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973)."

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals on the producer quota issue is in conflict with this Court's opinion in *Stark* v. *Wickard*, 321 U.S. 288, 303 (1944), and presents an important federal question concerning the scope of the powers of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. In addition, the decision of the court of appeals on the antitrust immunity question conflicts with this Court's decisions in the companion cases of *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), and *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*,

390 U.S. 261 (1968), and presents the important federal question whether a federal official empowered to issue an order conferring absolute antitrust immunity must consider antitrust implications in determining his course of action.

1. The applicable sections of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 *et seq.*, authorize the Secretary of Agriculture to regulate "handlers" (the definition of which does not include individual producers) of certain agricultural commodities. 7 U.S.C. § 608c(1). They also authorize the Secretary to establish purchasing and marketing allotments for handlers. 7 U.S.C. § 608c(6)(B)-(C). Unlike other federal agricultural acts,[3] however, they contain no authorization to establish production or marketing quotas for producers. Indeed, the Act explicitly provides, "No order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B).

The Marketing Order at issue here establishes just such producer marketing quotas by limiting the celery that a producer may sell to a fixed percentage of his "base quantity." 7 C.F.R. § 967.36(b). No other order presently implemented under the 1937 Act uses such a mechanism, although one recently promulgated order —plainly modeled on the Florida celery structure—is scheduled to be implemented in the 1974-75 crop season. *See* 7 C.F.R. § 929.49(a) (cranberries).

There are strong reasons for concluding that the 1937 Act does not authorize the sort of producer "quotas" found here. The Act was designed, as the

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[3] *E.g.*, Sugar Act of 1948, 7 U.S.C. §§ 1101 *et seq.*; Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1311 *et seq.*

policy declarations in 7 U.S.C. § 602(1) and § 602(4) demonstrate, to establish and maintain "orderly marketing conditions" for a wide range of agricultural commodities. By use of the powers conferred in the Act, it was intended to "provide, in the interests of producers and consumers, an orderly flow of the supply [of each commodity] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). *Nowhere in the 1937 Act was there the slightest suggestion that the Secretary was authorized by law to effect a limitation on individual farmers' production of any agricultural commodity in any geographic area, or to limit the entry of new producers.*

Section 8c(6) of the Act, 7 U.S.C. § 608c(6), enumerates the permissible terms and conditions of a marketing order. Subsections (B) and (C) respectively authorize the inclusion of provisions which allot, or provide methods for allotting, "the amount of such commodity or product . . . . which each handler may purchase from or handle on behalf of any and all producers thereof . . . ." and "the amount of any such commodity or product . . . which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce . . . ." None of the other subsections of § 608c(6), authorizing other types of mechanisms for related purposes, would be applicable as possible authority for the celery order; and at the beginning of the list of permissible mechanisms which an order may contain, Section 608c(6) explicitly provides that an order may include "no others" than those which follow.

One may search Marketing Order No. 967 from beginning to end and find not a single provision making allotments of the kind contemplated by subsections

(B) and (C)—*i.e.*, allotments "which each handler may purchase" or "which each handler may market." Rather than focussing, as the statute commands, on handlers' allotments, the celery order revolves around a production-quota system which is not contemplated by the 1937 Act and which is, in fact, prohibited by it.

Nor can the approach adopted in the celery order be properly defended by suggesting that the Act should be broadly interpreted to give the Secretary wide leeway. As this Court has observed in construing another portion of § 608c, this statute "does not contain a mandate phrased in broad and permissive terms." *Zuber* v. *Allen*, 396 U.S. 168, 183 (1969). Rather, there was a "congressional purpose to confine the boundaries of the Secretary's delegated authority." *Ibid.*

This Court has previously construed § 608c narrowly, as suggested by these considerations. In *Stark* v. *Wickard*, 321 U.S. 288 (1944), the Court considered a milk marketing order requiring handlers to pay minimum prices. The Court's opinion mentioned the explicit ban of § 608c(13)(B), *see* p. 8, *supra*, and discussed what, under that provision, a marketing order might lawfully do. As an example of what an order could *not* do, the Court said it "could not bar any qualified producers in the milk shed from selling to area handlers." 321 U.S. at 303 (dictum). The Court could hardly have described more precisely just what the Florida celery marketing order *does* do with respect to new producers who have not been awarded a "base quantity."

The approach taken by the courts below to the statutory scheme is plainly erroneous. If, as the court of appeals suggested, producer quotas may be imposed "indirectly" by limiting how much a producer may *sell* in a given season, the statutory limitations

are robbed of all meaning. There is obviously no practical difference between telling a farmer he cannot grow celery and telling him he cannot market it. And when Congress wanted to authorize the Secretary to issue marketing allotments to producers, it clearly indicated its intent to do so. The court of appeals relied on *Mulford* v. *Smith,* 307 U.S. 38 (1939), as sustaining production control through producer marketing quotas (p. 11a, *infra*). *Mulford* concerned the Agricultural Adjustment Act of 1938 which, in striking contrast to the 1937 Act, explicitly provided for quotas to be allotted to each producing farm. *See* 7 U.S.C. § 1313(b). *Mulford* and the statute it considered are persuasive indicators that the 1937 Act did not authorize a quota system.

Finally, it is blind formalism to acknowledge, on the one hand, that under the celery marketing order "a scheme of quotas arises whereby the producer is as regulated as a handler," 346 F. Supp. at 941, p. 28a, *infra,* quoted at 485 F.2d p. 1132, pp. 10a-11a, *infra,* and on the other hand to insist that producers are not thereby regulated *"in their capacity as producers."* 346 F. Supp. at 941, p. 28a, *infra,* quoted at 485 F.2d p. 1132, p. 11a, *infra* (emphasis in original). Especially when the result is to rob a statutory provision of any effect, the courts must and do look behind pure form to determine the validity of an order. ***E.g.,*** *Lehigh Valley Cooperative Farms, Inc.* v. *United States,* 370 U.S. 76 (1962).[4]

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[4] The Florida Supreme Court, of course, recognized that the regulatory scheme established quotas and that handlers were not being regulated. *See* p. 89a, *infra.* Indeed. the Florida system more readily allowed new producers to enter the market since it established a compulsory 2½% "reserve" each year for new entrants. *See* pp. 86a-87a, *infra.* The federal order merely allows a reserve to be created (7 C.F.R. § 967.37(d)), and none has yet been established in 9 years of operation.

2. Pursuant to Section 8b of the 1937 Act, 7 U.S.C. § 608b, the making of the celery marketing agreement cannot "be held to be in violation of any of the antitrust laws of the United States." Because of the importance of the procompetitive policies of the antitrust laws, the authority to grant antitrust immunity must carry a heavy responsibility to consider antitrust implications in the decision whether to issue the agreement and order. This Court has so held in cases involving analogous antitrust immunity provisions, most notably *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968) and *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n,* 390 U.S. 261, 273-274 (1968). In a unanimous decision this past Term, the Court explicitly reaffirmed the principle of these two cases. *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 728-729 (1973). And the rule requiring consideration of antitrust factors is not limited to a single statutory provision administered by the Federal Maritime Commission. See *Northern Natural Gas Co.* v. *Federal Power Comm'n,* 399 F.2d 953, 959 (D.C. Cir. 1968).

The Secretary of Agriculture did not consider the antitrust implications of his approval of the highly anticompetitive celery marketing order (30 *Fed. Reg.* 13708 (1965)), even though the Florida Supreme Court had just invalidated such a program because of its discrimination in favor of existing producers. *See Rabin* v. *Conner,* 174 So. 2d 721, 725 (Fla. 1965), p. 81a, *infra.* The Secretary should have considered these factors, however, because the rule in the shipping cases is directly applicable to decisions on agricultural marketing agreements. Antitrust exemptions

such as that in the 1937 Act should be narrowly construed, *Latin America/Pacific Coast S.S. Conf.* v. *Federal Maritime Comm'n*, 465 F.2d 542, 547 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 967 (1972). As in the shipping cases, moreover, the Secretary's evaluation of the public interest must include the "interests of . . . consumers." *See* 7 U.S.C. § 602. Failure to consider antitrust factors in a marketing order decision under the 1937 Act may contribute to skyrocketing food prices and other consequences harmful to consumers.

The respondents argued below that the shipping cases are distinguishable as involving only limited grants of antitrust immunity, whereas under the 1937 Act antitrust immunity is absolute. This proves all the more that the Secretary erred in failing to consider how competition would be affected. An administrator whose judgment is absolutely the final word on competitive conditions must surely consider the consequences of his actions as precisely as one whose view confers less than total immunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Oct. 10, 1973.

No. 72-3451.

CHIGLADES FARM, LTD., ET AL., *Plaintiffs-Appellants,*

v.

EARL L. BUTZ, Secretary of Agriculture of the United States of America, ET AL., *Defendants-Appellees.*

* * * * * * * * * * *

Before GOLDBERG, CLARK AND RONEY, *Circuit Judges.*

RONEY, Circuit Judge:

> Appellants have been trying since mid-1937 to do nothing more remarkable than grow and market celery in Florida, and this case concerns their heretofore unsuccessful efforts to achieve this modest goal.

This wailful preface to plaintiffs' brief would have bewildered the founders of this country. But so far are we now from the freedom of enterprise envisioned by those noble souls that the District Court's decision denying plaintiffs the right to sow, reap and sell must be affirmed. More precisely, plaintiffs may sow and reap all the celery they wish, but they cannot sell, because the market is regulated by federal law and they have been regulated out. We agree with the District Court that the federal administrative order which denied plaintiffs a share of the celery market is both lawful and constitutional.

To regulate the marketing of celery grown in Florida, the United States Secretary of Agriculture issues "base quantities," or market shares, to eligible producers. Plaintiffs, having been denied a market quota, brought this action to compel the Secretary to issue Chiglades Farm, Ltd., a base quantity. Alternatively, plaintiffs challenge the marketing

system as exceeding the Secretary's statutory authority, as being unconstitutional, and as violating the antitrust laws. Jurisdiction was invoked under 28 U.S.C.A. § 1331(a) [federal question]; 28 U.S.C.A. § 1361 [to compel a federal officer to perform his duty]; 5 U.S.C.A. § 701 et seq. [judicial review of administrative rulings]; and 15 U.S.C.A. § 4 [antitrust]. The District Court, by summary judgment, held that Chiglades is not entitled to a base quantity and that the Marketing Order is both lawful and constitutional. We affirm.

The Statutory Program

The Agricultural Marketing Agreement Act, 7 U.S.C.A. § 601 et seq., is designed to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce. Both to prevent unreasonable price fluctuations and to maintain parity prices, the Act authorizes the Secretary of Agriculture to promulgate marketing orders regulating "handlers" of specified agricultural commodities, including celery. 7 U.S.C.A. § 608c(3), (4).[1] Such orders may provide methods for the limitation of a commodity. Market shares are required to be determined subsequently by a "uniform rule" embracing the production history of each producer.

Pursuant to this Act, the Secretary issued Marketing Order No. 967, 30 Fed. Reg. 14266 (1965), to stabilize the Florida celery market through annual allotments establishing the maximum amount of celery each handler might purchase. For its administration, Marketing Order 967 created the Florida Celery Committee, composed of producers, handlers, and their employees, nominated by groups from different regions of the State. 9 C.F.R. §§ 967.25, 967.26, 967.28. Each season, the Committee recommends the total

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[1] "Handlers" are defined in the Act as "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof" specified in the Act. 7 U.S.C. § 608c(1).

amount of celery to be handled, and the Secretary, if necessary, may impose marketing limits to insure the season's "marketable quantity." 7 C.F.R. §§ 967.35(a), 967.36(a), 967.13.

Following promulgation of the Order in 1965, each producer was required to register with the Committee and to furnish its sales history since 1958. Producers with no sales during this period were entitled to inclusion if they made "firm and substantial" commitments to produce celery and were engaged in its production prior to September 30, 1965. 7 C.F.R. § 967.37(b). From this data, a "base quantity" was determined.

Marketing Order No. 967 was the result of the Florida Supreme Court's holding in Rabin v. Conner, 174 So.2d 721 (Fla. 1965), that a state celery marketing order was violative of the State and federal constitutions. Utilizing his rule-making power under the Agricultural Marketing Agreement Act, the Secretary of Agriculture adopted Marketing Order No. 967, similar in many respect to the State order.

The Facts

Chiglades Farm, Ltd. is a limited partnership, of which Leo Bramson and Marvin Welfeld are general partners, organized in 1962 to grow celery in a joint venture with A. J. Sullivan of Florida, Inc., a Florida corporation. Ansel J. Sullivan, one of the principals in the corporation bearing his name, was a long-time Florida celery producer and was allocated in 1962 a "base quantity" under the state marketing system. The Joint Venture Agreement provided that the quota held personally by Sullivan would be transferred to the Sullivan corporation, which would receive twenty percent of the net profits and bear no losses. Chiglades was to lease the land, contribute $75,000 for the production of celery, bear any losses and be entitled to eighty percent of the net profits.

Eugene McCabe, a veteran of the Florida produce business and a member of the Florida Celery Committee, initiated the business venture and was an organizer of the Sullivan corporation. He was also the principal officer of Pioneer Land Company, which leased the farm land to the joint venture, and Pioneer Growers Corporation, which marketed the joint venture's celery. All records and payments involving the cooperative were in the name of the Sullivan corporation, despite the Joint Venture Agreement's requirement that the operating bank account be in the joint venture's name.

In 1965, Ansel Sullivan died, the Florida Supreme Court ruled the state marketing system unconstitutional, and the federal plan was initiated. Pursuant to the new marketing order's registration requirements, the Sullivan corporation, not Chiglades, applied for and received a quota based on its past production history. Chiglades and Sullivan, Inc. then entered into a new Joint Venture Agreement, reciting that the Sullivan corporation had applied for a federal quota under which the joint venture would operate.

The joint venture was terminated in June, 1967.[2] Chiglades filed with the Florida Celery Committee an applica-

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[2] Throughout this litigation, plaintiffs have alleged extensive illegal and unethical conduct by McCabe. According to their account of the facts, McCabe suggested the joint venture to Bramson and offered to "resurrect" Ansel Sullivan's celery quota. McCabe, personally and through Horace Unwin, the bookkeeper of Pioneer Growers Cooperative and A. J. Sullivan of Florida, Inc., then arranged the joint venture's affairs to his best interest.

The operation of the venture was left practically entirely to McCabe. Contrary to the Joint Venture Agreement, its bank account was under the Sullivan corporation's name. McCabe and Unwin obtained control of the Sullivan corporation without informing any of the Chiglades partners; and after the federal quota system was introduced, McCabe urged Bramson that application for a base quantity should be in the Sullivan corporation's name. Although he abstained from voting, McCabe also was one of the five members of the Florida Celery Committee's Marketing Subcommittee which issued the base quantity in 1965 to the Sulli-

tion for a new base quantity to be awarded from any reserve established by the Secretary of Agriculture. The application, on the form designed for producers who have no record of celery sales during the base period, listed the joint venture's production history as its own, and no reference was made to the Sullivan corporation. The following month, the application was denied, and similar efforts seeking a "reserve" base quantity in May, 1969 and 1970, proved unsuccessful after the Secretary determined that no marketing reserve would be established in those years.

In May, 1969, Chiglades filed a quota application based on its alleged production history during the joint venture. After a hearing, both the Department of Agriculture examiner and the Florida Celery Committee concluded that Chiglades was not entitled to credit for the base quantity issued to the Sullivan corporation. The Secretary of Agriculture upheld this decision on the ground that the limited partnership never produced celery in its own capacity and that the Marketing Order, both as promulgated and as applied, is within the purposes of the Act and is constitutional.

The District Court held that the Secretary's award of a base quantity to Sullivan, Inc., rather than to Chiglades, was supported by substantial evidence and that, in view of

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van corporation. As this statement of facts relates, the joint venture was terminated when Bramson first learned of McCabe's personal interest in the Sullivan corporation.

These allegations, depicting the subject events in light of McCabe's self-dealing, are not central to the issues posed by this appeal and were addressed by two state actions filed by Chiglades. In the first, brought on the theory that McCabe owed a fiduciary obligation to the partnership, summary judgment was granted for McCabe on the ground that a limited partner has no fiduciary duty to the partnership. The second action, to compel the Sullivan corporation to proceed with the joint venture by permitting the base quantity to be used by Chiglades on land other than that owned by the Pioneer Land Company, was terminated by voluntary dismissal. A final order of dissolution of the Chiglades partnership, at McCabe's initiative, was entered on April 21, 1970.

market demands, the Secretary was justified in refusing to issue Chiglades a new quota. The Court held that the Marketing Order was both a proper exercise of the Secretary's statutory authority and constitutional and that the antitrust laws had not been violated since 7 U.S.C.A. § 608b specifically provides that marketing agreements shall not be held violative of any antitrust laws.

The Base Quantity Assignment

Plaintiffs contend that between 1962 and 1965, Chiglades was the sole "producer" of celery under the joint venture, that it is therefore entitled to the Sullivan corporation's base quantity or the allocation of a new quota, and that the District Court erred in concluding that the Secretary's refusal to issue a quota was based on substantial evidence.

[1, 2] Review of administrative proceedings under the Agricultural Marketing Agreement Act is limited by 5 U.S.C.A. § 706.[3] The District Court properly confined itself to a determination of whether the decision rendered by the Secretary was supported by substantial evidence. *See* 5 U.S.C.A. § 706(2)(E); Watson v. Gulf Stevedore Corp., 400 F.2d 649, reh. denied, 404 F.2d 1059 (5th Cir.), cert. denied, 394 U.S. 976, 89 S.Ct. 1471, 22 L.Ed.2d 755 (1968); Lewes Dairy v. Freeman, 401 F.2d 308 (3rd Cir.), cert. denied, 394 U.S. 929, 89 S.Ct. 1187, 22 L.Ed.2d 455 (1968). The District Court observed that the following facts tended to substantiate the Sullivan corporation's claim to the base quantity:

1. Sullivan, Inc. possessed a base quantity under the Florida regulation which was subsequently held unconstitutional.

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[3] 5 U.S.C.A. § 706 provides the following scope of review:

To decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

2. A. J. Sullivan had a long history as producer of celery in Florida.

3. The payroll bank account of the joint venture was in Sullivan, Inc.'s name, but all money deposited in it came from the account maintained by the joint venture.

4. Pioneer Growers Cooperative, which was the handler for the celery grown by the joint venture maintained its accounts only in the name of Sullivan, Inc., and made payments directly to Sullivan, Inc. It should be borne in mind, however, that Pioneer Growers Cooperative was aware that it was in effect handling celery for the joint venture, since E. A. McCabe was an officer of Pioneer Growers Cooperative, and was also an officer of Pioneer Land Co. which leased the land to Chiglades for the purpose of growing celery under a joint venture agreement with Sullivan, Inc. And although money was paid directly to Sullivan, Inc., it was then transferred into the account maintained by the joint venture for distribution.

5. When Order No. 967 was first promulgated, it was Sullivan, Inc., and not Chiglades nor the joint venture that made application to the Florida Celery Committee for a base quantity.

6. The joint venture agreement provided that Sullivan, Inc. was to obtain a base quantity, and no mention was made as to a base quantity being taken in the name of or owned by the joint venture.

Chiglades' claim rests on the following evidence:

1. Chiglades was the dominant contributor to the joint venture and was entitled to a substantially greater share of the profits than Sullivan, Inc.;

2. All the land used for the production of celery was leased by Chiglades from Pioneer Land Co.;

3. All initial funds for operation of the joint venture were supplied by Chiglades;

4. Sullivan, Inc. originally supplied the equipment, but Chiglades was to be responsible for all additional equipment needed. After A. J. Sullivan's death, Chiglades purchased all the equipment from his estate; and so Chiglades eventually owned all the farming equipment;

5. All losses incurred by the joint venture were to be borne in full by Chiglades. The 1962 agreement provided that profits were to be divided 80 percent to Chiglades and 20 percent to Sullivan, Inc. The 1965 agreement divided profits 92½ per cent to Chiglades and 7½ per cent to Sullivan, Inc. A. J. Sullivan was to assign all his shares in Sullivan, Inc. to Chiglades as a pledge for his performance under the Joint Venture Agreement, but he never did so.

Weighing these facts, the District Court concluded that the Secretary's decision that the base quantity should remain with the Sullivan corporation was neither arbitrary, capricious, nor unsupported by substantial evidence. We agree.

First, Chiglades was not clearly a producer under the Marketing Order's definition or within its criteria for entitlement to a base quantity. Under the Marketing Order,

> "Producer" means any person who grew or grows celery in the production area in a proprietary capacity. The person with the right to sell celery so that handlers may purchase from such person or may handle on such person's behalf is in fact a producer. In sharecropping arrangements, such person receiving a share of the crop with authority to pass title thereon is a producer of the celery he owns. A renter with full right to dispose of a celery crop by passing clear title is a producer.

30 Fed. Reg. at 13710.

The Sullivan corporation made all sales, received all proceeds, supplied most equipment, and made production commitments for the partnership. Chiglades neither had any history of celery production in the 1965-1966 or earlier seasons nor had made, prior to September 30, 1965, any "firm and substantial" commitments for such production, as required for designation as a "producer" under the Order. 7 C.F.R. § 967.37. We find no support for extending to a limited partnership or its partners the characteristics required to meet the Marketing Order's definition of "producer."[4]

Second, the same factors which support the Secretary's finding that Chiglades did not qualify as an independent producer in 1965 also provide substantial evidence for the determination that Chiglades did not have a history of celery production in prior seasons. In fact Chiglades was not in existence during some of the years considered in granting the quota to the Sullivan corporation.

Third, there is no evidence to show that Chiglades sought to assert any claims to producer status in 1965 when the Sullivan corporation was awarded its base quantity. Applicants for a base quantity in the initial 1965-1966 season were required to file by December 20, 1965, a deadline not met by plaintiffs.[5] Only after dissolution of the joint venture did Chiglades first assert a proprietary interest in the

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[4] To demonstrate its "proprietary capacity," Chiglades relies on irrelevant authority. *See, e. g.*, Owen v. Comm'r, 192 F.2d 1006 (5th Cir. 1951), and Irrgang v. Fahs, 94 F. Supp. 206 (S.D. Fla. 1950) [involving the taxation of gains from sales of unsevered fruit]; Adams v. Adams, 158 Fla. 173, 28 So.2d 254 (1946) [involving estate problems relating to citrus crops].

[5] Plaintiffs argue that they had been supplied the wrong forms and allege that McCabe's deceits were responsible for the continued reliance on the Sullivan corporation for a base quantity. These contentions are not responsive to the Secretary's requirement that all past or current producers in 1965 themselves apply under the new federal marketing system.

celery. We can only conclude from these facts that Chiglades determined in 1965, under a theory or pretext irrelevant to this suit, that the Sullivan corporation's obtaining a quota for the joint venture would be in the limited partnership's best interests.

Fourth, under the terms of the Joint Venture Agreement, the base quantity was retained by the Sullivan corporation and never passed either to Chiglades or the limited partnership.

Fifth, since plaintiffs seek issuance of a new quota if it is determined that the Sullivan corporation is entitled to the one in question, we are directed to the Marketing Order's provisions for reserve quotas. 7 C.F.R. § 967.37 (d)(1). The District Court found that "[s]ince present and past demand for celery has been limited, an increase in the total base quantities for the industry [permitting issuance of a reserve quota] is currently unwarranted," and the Secretary's refusal to grant one met the substantial evidence standard.

Conformity With the Agricultural Marketing Agreement Act

[3] Plaintiffs' contention that Marketing Order No. 967 is invalid because it exceeds the authority granted the Secretary of Agriculture by the Agricultural Marketing Agreement Act rests on three premises: (1) the Marketing Order assigns production quotas rather than regulating distribution as authorized by the Act, (2) the allocation method is unreasonable, and (3) the base quantity system excludes new growers from the industry. Finding no merit to any of these arguments, we find the Marketing Order to be a valid exercise of the Secretary's statutory authority.

First, the District Court noted that, notwithstanding the exemption of producers from regulation, 7 U.S.C.A. § 608c (13)(B), "[w]hen the Secretary formulates a rule based upon prior production history as to the amount each handler may handle from each producer, a scheme of

quotas arises whereby the producer is as regulated as a handler." The Court sanctioned such indirect regulation, however, on the ground that § 608c "does not actually regulate producers *in their capacity as producers.*"

To justify the Marketing Order, the Secretary of Agriculture distinguished between the permissible regulation of the amount which a producer may sell to a handler and the prohibited regulation of the amount a producer may grow. Although no appellate court decisions concerning this distinction's application to the Agricultural Marketing Agreement Act have been brought to our attention, the Supreme Court has found such a distinction valid under the Agricultural Adjustment Act. In Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939), where petitioners challenged marketing quotas apportioned to tobacco farms subject to penalties on warehousemen who marketed tobacco in excess of any farm's quota, the Court, upholding the regulatory system, found that "[t]he statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota." 307 U.S. at 47, 59 S.Ct. at 652.

Similarly, the Florida celery producer is not limited to growing any maximum amount. It is only the marketing of his produce that is regulated and that is the precise statutory objective of the Agricultural Marketing Agreement Act, under which the Celery Marketing Order was promulgated. It cannot be said, therefore, that the Secretary of Agriculture exceeded his authority in promulgating an order affecting production only indirectly while regulating the industry's marketing.

Second, plaintiffs argue that, contrary to the dictates of 7 U.S.C.A. § 608c(6)(B) [6] that base quantities be appor-

[6] Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of

tioned "equitably among producers", the Marketing Order provisions for the allocation of quotas according to production history are based on unrepresentative periods. A similar contention was rejected by the Supreme Court in Sec'y of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S.Ct. 403, 94 L.Ed. 381 (1950), where the Court upheld the Secretary's allotment of sugar quotas under the Sugar Act of 1948, 7 U.S.C.A. § 1100 et seq.

In *Central Roig Refining Co.*, the Court examined another quota system founded on past market share and acknowledged that "[fixing] quotas on a strict historical basis is hard on latecomers into the industry . . . ." 338 U.S. at 617, 70 S.Ct. at 410. But the Court concluded that

> since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.

338 U.S. at 618, 70 S.Ct. at 410.

The celery marketing system does not employ a rigid historical base period. Congress specifically provided that allotments may be based, at the Secretary's discretion, upon the amounts sold by producers in such period as the Secretary determines to be representative or upon the current quantities available for sale or both. *See* 7 U.S.C.A.

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any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers. 7 U.S.C.A. § 608c(6)(B).

§ 608c(6)(B). As noted above, producers with no sales during the period determined to be representative are entitled to base quantities if they made "firm and substantial production commitments and were engaged in production prior to a designated date." 7 C.F.R. § 967.37(b).

Third, the base quantities are not, as plaintiffs allege, "perpetual transferrable licenses" which operate to preclude entry of new producers into the industry. New producers may obtain quotas in either of two ways: (1) producers, with the Celery Committee's approval, may transfer all or part of their allotments, *see* 7 C.F.R. § 967.39, and (2) new quotas may be issued from the reserve amount established by the Secretary of Agriculture in any season, *see* 7 C.F.R. § 967.37(d)(1). Only the Secretary, not the present producers or their marketing committee, has the power to preclude entry of new growers in the industry. 7 C.F.R. §§ 967.37(d)(1), 967.37(d)(3).

Admittedly, no reserve quotas have been issued since promulgation of the Order, but the Secretary contends that his refusal to issue a new quota is consistent with the objectives of the Agricultural Marketing Act since there has been no increased demand for celery. Furthermore, if he deems the Marketing Order not to be in furtherance of the Act's policy, he is empowered to terminate the program. 7 U.S.C.A. § 608c(16)(A). Thus, the Order does not preclude entry of new producers into the industry and does not confer "perpetual licenses" on any group of producers.

Constitutional Questions

Plaintiffs argue that (1) Marketing Order No. 967 is unconstitutional for the reasons the Florida Celery Order was struck down in Rabin v. Conner, *supra,* and (2) they were deprived of due process by the composition and authority of the Florida Celery Committee. Neither of these constitutional claims is valid.

[4] *First*, although the Florida Celery and Sweet Corn Marketing Law, Ch. 573, F.S.A. (1959) found unconstitutional by the Florida Supreme Court in *Rabin*, was similar in objectives and mechanics to the federal Marketing Order, there is one crucial difference. Under the Florida system, permanent base quantities could be changed only by amending the orders. Reserve quotas not to exceed 2½% of the permanent allotments could be issued to new producers each year, but no producer could be assigned more than 25% of the 2½% total reserve amount. Only after three successive years of production under reserve quotas could a new producer be issued a permanent base quantity, and that would be equal to the average number of crates sold by him during his production years.

Thus, it was impossible for a new producer ever to be assigned a quota competitive in volume with older producers. The Florida Court, viewing the system as an arbitrary exercise of the State's police power, reasoned that

> [i]t is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and a denial of equal protection of the law. So viewed, the marketing order is violative of Sections 1 and 12, Declaration of Rights, Florida Constitution and the Fourteenth Amendment to the United States Constitution.

174 So.2d at 725. The federal regulatory system has no such impediment to a new producer's gaining a share in any increase in the celery market.

In view of the aforementioned distinction between the Florida and federal systems, the Florida Supreme Court's reasons for finding the state plan unconstitutional do not

pertain to the case at bar. Moreover, the Florida court did not decide "the more basic question of whether the state, in the exercise of the police power, may or may not regulate the quantity of celery which may be sold by or handled for producers . . . ." The court concluded that it was "unnecessary that we do so because . . . we find the manner of regulation employed . . . to be invalid . . . ." 174 So.2d at 725-726. Thus, plaintiffs can find no broader constitutional support for their position in Rabin v. Conner, *supra*.

[5] *Second*, plaintiffs complain that the composition of the Florida Celery Committee vests control of the industry in a group of self-interested producers and thereby deprives them of due process of law. It is argued that, despite the Secretary's ultimate authority, he exercises no independent judgment. The District Court agreed that "their motivation, at least in part, stems from self-interest," but noted that it is the Secretary

1. Who actually selects committee members.
2. To whom recommendations and complaints are made.
3. Who limits the total celery to be handled during a marketing season.
4. Who sets aside a reserve for those persons who desire to increase their base quantity or who have no base quantity.
5. Who issues other regulations to effectuate the policy of the marketing order.
6. Who hears and passes on all appeals from orders of the Florida Celery Committee.

The Court concluded, therefore, that the checks on the Committee's powers are effective, and we agree.

Congress has approved the use of such producer-controlled committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry's needs to make recom-

mendations to the Secretary. *See, e.g.*, Sen. Rep. No. 566, 87th Cong., 1st Sess., p. 39, 2 U.S.C.C.A.N., 87th Cong., 1st Sess., pp. 2243, 2281. This Court, upholding producer committees in the citrus industry in Whittenburg v. United States, 100 F. 2d 520 (5th Cir. 1939), found that

> [a]ction taken is always that of the Secretary. These others [producers] gather and present information to give him a broader view of the situation. Their concurrence gives his action support and tends to assure its enforcement. But they have no actual power.

100 F.2d at 523.

We recognize that McCabe, whom plaintiffs portray as the culprit in their lack of success, is a member of the Florida Celery Committee and this fact highlights the potential for abuse that is implicit in any self-regulatory body. McCabe, nevertheless, abstained from voting on the Chiglades application for a base quantity, and any arbitrariness of the Committee's decisions fails to meet constitutional dimensions.

Antitrust Problems

[6] Under 7 U.S.C.A. § 608b,

> The making of any such [marketing] agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful.

Plaintiffs maintain that, insofar as Marketing Order No. 967 exceeds its statutory authority, this antitrust immunity is inapplicable. Having found no abuse of authority, however, we must conclude that the immunity is undisturbed. Where such total immunity is granted, there can be no violation of the antitrust laws. *See* Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT, S. D. FLORIDA.

August 1, 1972.

No. 71-837-Civ.

LEO BRAMSEN and MARVIN WELFELD, individually and as Trustees for themselves and the limited partners of Chiglades Farm, Ltd., *Plaintiffs*,

v.

CLIFFORD HARDIN, Secretary of Agriculture of the United States, ET AL., *Defendants*.

* * * * * * * * * * *

FULTON, Chief Judge.

This cause came before the Court upon a motion to dismiss or in the alternative for summary judgment filed by defendants Clifford Hardin and Floyd Hedlund and a motion to dismiss filed by defendant A. J. Sullivan. Plaintiffs admit that there is no genuine issue of material fact and have also moved for summary judgment. The Court heard argument of counsel and has since received and studied the briefs submitted by counsel.

The origin of this case is a ruling by the Florida Celery Committee which Committee is organized under Marketing Order 967, 7 C.F.R. § 967.130ff. promulgated by the Department of Agriculture pursuant to the authority of 7 U.S.C. §§ 601-674. The Florida Celery Committee and a Hearing Examiner of the Department of Agriculture conducted a Hearing and made a ruling which was appealed to the Secretary of Agriculture, by whom the decision was affirmed. Plaintiffs have exhausted their administrative remedies.

Jurisdiction

The Court's jurisdiction is invoked under 28 U.S.C. § 1331(a), general federal question; 28 U.S.C. § 1361, actions to compel an officer of the United States to perform

his duty; 5 U.S.C. §§ 701 et seq., permitting judicial review of administrative agency rulings; 15 U.S.C. § 4, anti-trust jurisdiction.

Plaintiffs claim that they are entitled to a base quantity for the production of celery presently belonging to defendant A. J. Sullivan of Florida, Inc., or that they are entitled to the issuance of a base quantity by the Florida Celery Committee; or that Marketing Order No. 967 which provides for the selection of The Florida Celery Committee, is unconstitutional; or that Marketing Order No. 967 is being administered unconstitutionally.

[1] None of the parties have requested that the Court convene a Three-Judge Court, nor is that necessary in this case even though the constitutionality of a federal regulation has been called into question. A challenge of the constitutionality of an administrative regulation is not to be considered an attack on an Act of Congress as applied, so as to require hearing by a Three-Judge Court. Sardino v. Federal Reserve Bank of N. Y., 361 F.2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130.

Facts

The facts in this case are not disputed. A detailed and excellent summary of the facts may be found in the Secretary's review of the committee's determination, dated September 10, 1970, document # 25, U.S.D.A. Administrative, Record, which has been made a part of the record of this cause. There is, therefore, no need to restate the facts exhaustively.

Leo Bramson and Marvin Welfeld, as general partners, joined with eleven limited partners to form Chiglades Farm, Ltd., for the purpose of farming celery and other vegetables in Florida. On October 29, 1962, Chigaldes entered into a joint venture with A. J. Sullivan of Florida, Inc. whose major shareholder was A. J. Sullivan. Mr. Sullivan was the possessor of a base quantity issued by the

Florida Department of Agriculture. The joint venture was or became engaged in celery production.

The Florida Statute regulating the production of celery was held unconstitutional as violating the Florida Constitution by the Florida Supreme Court, Rabin v. Conner, 174 So.2d 721 (1965). The United States Department of Agriculture promulgated Agricultural Marketing Order No. 967, which, as amended, continues to regulate and control the marketing of celery in Florida. Agriculture Marketing Order No. 967 (hereinafter called Order 967) establishes the Florida Celery Committee to administer the provisions of the Order and to make recommendations to the Secretary of Agriculture regarding limitations on the marketing of the Florida celery. Under that Order the Florida Celery Committee members are elected annually by Florida celery producers.

In order to produce celery in Florida, producers were required to possess a base quantity issued by the Florida Celery Committee. The Committee was to issue base quantities on the following basis:

1. To applicants with a prior history of celery production:
   (a) An amount of the greatest number of crates of celery sold by or for him during any one of production seasons 1961-62 through 1964-65; or
   (b) An amount derived by computing the average of sales by or for him for any two of the seven production seasons 1958-59 through 1964-65.
2. For producers with no prior history during seasons 1958-59 through 1964-65, or for those whose sales were not representative of present commitments, a base quantity could be issued based upon commitments, so long as they were, prior to September 30, 1965, firm and substantial and the producer actually engaged in celery production before that date.

When the Florida Regulatory Scheme was held to be unconstitutional by the Supreme Court of Florida, Rabin v. Conner, *supra,* Chiglades Farm, Ltd. (hereinafter referred to as Chiglades) and A. J. Sullivan of Florida, Inc. (hereinafter referred to as Sullivan, Inc.) entered into a new joint venture agreement for the production of celery with Sullivan, Inc. to apply for a base quantity as required by Order No. 967. Sullivan, Inc., applied for and received a base quantity, and the joint venture continued to produce celery, which was handled by a Co-op which is known as Pioneer Grower Cooperative. The joint venture was terminated sometimes in June, 1967, after the death of A. J. Sullivan. Leo Bramson and Marvin Welfeld, the general partners of Chiglades then discovered that E. A. McCabe, one of Chiglades limited partners, and an officer of both Pioneer Land Co. and Pioneer Growers Cooperative and an employee of the joint venture, was now the owner or major stockholder of Sullivan, Inc. The joint venture leased its farm land from Pioneer Land Company and handled its celery through Pioneer Growers Co-operative.

After the joint venture was terminated, Chiglades found that it could no longer grow celery because the base quantity was issued in the name of Sullivan, Inc. Chiglades made repeated attempts to obtain a base quantity from the Florida Celery Committee, unsuccessfully. Chiglades contends that it was entitled to the base quantity presently owned by Sullivan, Inc., or in the alternative is entitled to the issuance of a new base quantity.

Scope of Review

[2, 3] Since this action comes to the Court for review of an administrative decision made by the Secretary of Agriculture, the scope of the Court's review is limited by 5 U.S.C. § 706. Hence, as to all findings of fact, the decision of the Secretary must stand if it is supported by substantial evidence, 5 U.S.C. § 706(2) (E); Watson v. Gulf Stevedore Corp., 5 Cir., 400 F.2d 649, reh. denied Young & Co. v.

Shea, 404 F.2d 1059 (5th Cir. 1968), cert. denied 394 U.S. 976, 89 S.Ct. 1471, 22 L.Ed.2d 755. The facts giving rise to the controversy are, however, uncontested. It is the responsibility of the Court alone

> to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. 5 U.S.C. § 706.

It would appear then that the Court's authority is clear-cut. But

> [t]here is no certain standard for distinguishing "questions of law" from "questions of fact," and great difficulty and diversity has been met in the application of the law—fact test . . . . 2 Am.Jur.2d Administrative Law § 618.

This Court is confronted with just that problem. Since the facts themselves are undisputed, a major question is whether this reviewing court may or should *de novo* find and apply the facts to Marketing Order 967 or whether this Court should also rely upon the substantial evidence test in the application of the facts to the regulation. The Supreme Court in reviewing a decision by the Securities Exchange Commission upheld the findings of the S.E.C. as a matter of law when such decision was based upon substantial evidence and was consistent with the authority granted by Congress, Niagara Hudson Power Corp. v. Leventritt, 340 U.S. 336, 71 S.Ct. 341, 95 L.Ed. 319 (1951). To create the standard of substantial evidence, and then to limit the standard to mere evidentiary and credibility choices without accepting the same standards in determining the application of those facts to the regulation being administered appears to defeat the intent of Congress. The substantial evidence test has therefore been construed broadly.

> The term "substantial evidence" in particular has become a term of art to describe the basis on which an

> administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it* . . . . United States v. Carlo Bianchi & Co., 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963).

The Court, in the case sub judice, will utilize the standard of "substantial evidence" as expanded by *Bianchi*. The standard for review as to the constitutionality of the regulation will be discussed post (Is Order 967 unconstitutional on its face).

ARE PLAINTIFFS ENTITLED TO THE BASE QUANTITY PRESENTLY POSSESSED BY DEFENDANT SULLIVAN, INC.

In deciding this issue, the Court will rely upon the findings of fact and the applications of those facts to Order 967 as determined by the Secretary of Agriculture, provided that such determination was rendered on the basis of substantial evidence.

The facts which would tend to substantiate Sullivan, Inc.'s claim to the base quantity are the following:

1. Sullivan, Inc.. possessed a base quantity under the Florida regulation which was subsequently held unconstitutional.
2. A. J. Sullivan had a long history as a producer of celery in Florida.
3. The payroll bank account of the joint venture was in Sullivan, Inc.'s name, but all money deposited in it came from the account maintained by the joint venture.
4. Pioneer Growers Cooperative, which was the handler for the celery grown by the joint venture maintained its accounts only in the name of Sullivan, Inc., and made payments directly to Sullivan, Inc. It should be borne in mind, however, that Pioneer Growers Coop-

erative was aware that it was, in effect handling celery for the joint venture, since E. A. McCabe was an officer of Pioneer Growers Cooperative, and was also an officer of Pioneer Land Co. which leased the land to Chiglades for the purpose of growing celery under a joint venture agreement with Sullivan, Inc. And although money was paid directly to Sullivan, Inc., it was then transferred into the account maintained by the joint venture for distribution.

5. When Order No. 967 was first promulgated, it was Sullivan, Inc., and not Chiglades nor the joint venture that made application to the Florida Celery Committee for a base quantity.

6. The joint venture agreement provided that Sullivan, Inc. was to obtain a base quantity, and no mention was made as to a base quantity being taken in the name of or owned by the joint venture.

Chiglades also presents strong evidence that it is entitled to the base quantity presently possessed by Sullivan, Inc., as follows:

1. Chiglades was the dominent contributor to the joint venture and was entitled to a substantially greater share of the profit than Sullivan, Inc.,

2. All the land used for the production of celery was leased by Chiglades from Pioneer Land Co.;

3. All initial funds for operation of the joint venture were supplied by Chiglades;

4. Sullivan, Inc., originally supplied the equipment, but Chiglades was to be responsible for all additional equipment needed. After A. J. Sullivan's death, Chiglades purchased all the equipment from his estate; and so Chiglades eventually owned all the farming equipment;

5. All losses incurred by the joint venture were to be borne in full by Chiglades. The 1962 agreement pro-

vided that profits were to be divided 80 per cent to Chiglades and 20 per cent to Sullivan, Inc. The 1965 agreement divided profits 92½ percent to Chiglades and 7½ per cent to Sullivan, Inc. A. J. Sullivan was to assign all his shares in Sullivan, Inc. to Chiglades as a pledge for his performance under the joint venture agreement, but he never did so;

6. Chiglades purchased the celery seed beds from S & W Farms.

Chiglades in its memorandum of law argues that it qualifies as a producer of celery according to the provisions of Order 967.37 and is entitled to the issuance of a base quantity. However, this statement totally ignores the fact that Chiglades did not apply for a base quantity for itself in 1965, and the base quantity legally belonged exclusively to Sullivan, Inc., rather than to the joint venture. Sullivan, Inc., applied for and received the quota in its own name and not as or for the joint venture. It is futile and needless at this point to decide whether Chiglades rather than Sullivan, Inc. would have been entitled to the initial issuance of the base quantity in 1965, if application was made therefor.

[4] On the basis of these facts, the Court cannot say that the Secretary of Agriculture's decision in favor of Sullivan, Inc. and against Chiglades as to ownership of the base quantity in question is arbitrary or capricious or not supported by substantial evidence. Lewes Dairy, Inc. v. Freeman, 401 F.2d 308 (3d Cir. 1968). Freeman v. Hygeia Dairy Co., 326 F.2d 271 (373) (5th Cir. 1964).

ARE PLAINTIFFS ENTITLED TO THE ISSUANCE OF A NEW BASE QUANTITY?

[5] Assuming the constitutional validity of Order 967, Chiglades seeks reversal of the Secretary's determination that it is not entitled to the issuance of a new base quantity

from the Florida Celery Committee. Order 967.37(d)(1) provides:

> Each marketing season the Committee, with approval of the Secretary, may set aside a reserve for persons who request an increase in their Base Quantities or who have no Base

Since the promulgation of Order 967, no "Reserve" has been established by the Florida Celery Committee.

Order 967.36(a) establishing a total marketable quantity, provides that the committee first determine the demand for celery and then set an annual marketable quantity, which is the total amount all the celery producers are permitted to produce. Each producer is allotted a marketable quantity based upon his base quantity. Since the Committee was established, the marketable quantities promulgated have never equalled the total amount of outstanding base quantities. In other words, the amount of celery the committee permitted to be produced was always less than the total amount of celery each producer could produce on the basis of the base quantity he possessed. It was upon this reasoning that the Florida Celery Committee refused to establish a "Reserve" for the issuance of new base quantities. Since present and past demand for celery has been limited, an increase in the total base quantities for the industry is currently unwarranted.

The plaintiffs have not argued that the present demand for celery exceeds the present supply; in fact, there is considerable evidence to the contrary. And this Court is not prepared to substitute its judgment concerning the marketing conditions of celery for that of the Florida Celery Committee and the Secretary of Agriculture.

DOES ORDER 967 AS FORMULATED OR AS ADMINISTERED OPERATE IN RESTRAINT OF TRADE?

Chiglades contends that Order 967 as formulated or as administered operates in restraint of trade in the production and marketing of celery by excluding new farmers from the market and authorizing present producers to limit total production for their own benefit. Since its inception, The Florida Celery Committee has failed to establish a reserve for the increase of producers' base quantities or the issuance of new base quantities.

All marketing agreements under Chapter 26 of Title 7 are exempt from anti-trust laws. The Secretary of Agriculture is given permission to enter into marketing agreements with handlers, producers, etc. and

> The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful. 7 U.S.C. § 608b.

Additionally, 7 U.S.C. § 608c(6) specifically authorizes the Secretary to impose limitations and allotments on the handling of certain agricultural products. The declaration of policy as enunciated by 7 U.S.C. § 602 is to create marketing standards which provide for the orderly flow of farm products to the market place for the protection of the farmer and the consumer. Since the primary purpose of the Act is regulation and limitation, anti-trust immunity complements its policy.

Chiglades maintains however, that insofar as the Florida Celery Committee exceeded its authority, or insofar as Order 967 exceeds the authority of 7 U.S.C. § 608c, anti-trust immunity no longer attaches, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966). As Chiglades itself admits, this argument is circular. If the Florida Celery Committee has acted beyond the authority granted by Order 967 or if

Order 967 exceeds the authority granted by Congress to the Secretary, on that basis (and not anti-trust violations) the decision of the Secretary must fall.

[6] Chiglades also contends, however, that the Secretary had an affirmative duty to consider anti-trust implications by determining whether the anticompetitive effects of Order 967 are justified by public need. Carnation Co. v. Pacific Westbound Conference, *supra* and Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 88 S.Ct. 1005, 19 L.Ed.2d 1071 (1968) construed the Shipping Act of 1916 and held that only limited immunity from the anti-trust laws was provided for in the Act and the Federal Maritime Commission's own formula of "public interest" was the proper standard. These cases are distinguishable from the case at bar. The anti-trust exemption provided by 7 U.S.C. § 608b is clear, unequivocal and unlimited. No prior determination by the Secretary of possible anti-competitive effects is required. Order 967 is thus exempt from the anti-trust laws.

IS ORDER 967 INVALID BECAUSE IT EXCEEDS THE AUTHORITY GRANTED TO THE SECRETARY BY CONGRESS?

[7] The Secretary of Agriculture's authority is derived from 7 U.S.C. § 608c which provides, in part:

> The Secretary of Agriculture shall, subject to the provisions of this section, issue . . . orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers."

Two categories of persons are specifically exempt from the Act: retailers and producers.

> No order issued under this chapter shall be applicable to any producer in his capacity as a producer. 7 U.S.C. § 608c (13) (B).

No one questions the fact that Chiglades is a producer of celery who is unable to grow its products because it lacks the requisite base quantity. It would appear, therefore, that Order 967 is operating to regulate producers in their capacity as producers, which authority is particularly circumscribed by 7 U.S.C. § 608c(13)(B).

Producers are limited by the Secretary's authority to issue orders regulating the amount of each product

> which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative . . . to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers. 7 U.S.C. § 608c(6) (B).

When the Secretary formulates a rule based upon prior production history as to the amount each handler may handle from each producer a scheme of quotas arises whereby the producer is as regulated as a handler. A producer, totally exempt *as a producer*, by virtue of § 608c (13) (B) nevertheless endures the ultimate form of regulation, being unable to grow his produce because the law deprives him of his way to market. In this regard, the § 608c appears to be self-contradictory.

The apparent contradiction vanishes, however, when it is recalled that § 608c does not actually regulate producers *in their capacity as producers.* No mention is made or limitation provided upon the amount of land they may till, the fertilizer which is used, or any other means producers utilize as producers. They are only regulated with respect to their relationship with handlers. This regulation, while indirect, is totally effective in the determination of whether there is a market for the producer's product. Therefore,

direct controls are not necessary to limit a producer's agricultural yield.

The next question to be decided is whether the scheme of base quantities put into effect by Order 967 provides an apportionment "equitably among producers." If it does not, then in this regard, Order 967 has failed to comply with the requirements of § 608c.

[8] § 967.39 provides that producers of celery, upon the approval of The Florida Celery Committee may transfer all or part of both their base quantities and marketable allotments. Chiglades contends that since base quantities are treated as freely alienable property rights in this regard, Order 967 exceeds the authority granted by Congress to the Secretary of Agriculture.

7 U.S.C. § 608c(5) (B) specifically regulating the handling of milk and milk product permits:

> Bases allocated to producers under this clause (f) may be transferable under an order on such terms and conditions, including those which will prevent bases taking on an unreasonable value, as are prescribed in the order by the Secretary of Agriculture.

The transfers made thereof are to be utilized to alleviate "hardship and inequity among producers" and for the entry of new producers.

There is no such transfer provision or limitation affecting celery. Since Congress was aware of the problem of transfer as evidenced by 7 U.S.C. § 608c(5)(B) concerning milk bases, we must assume that the absence of applying such limitation upon other commodities was deliberate. In this respect therefore, Order 967 does not exceed the authority granted by Congress.

[9] It must be borne in mind that at the time that base quantities were originally allocated under Order 967, they were apportioned "equitably among producers." All those

who had produced celery were permitted to apply for the issuance of a base quantity (§ 967.37) and those producers who "had made firm and substantial commitments for the production of celery" were also permitted to apply, so that the quotas issued would be "equitable to all producers," (§ 967, 37(b) (2)). Because Chiglades failed to apply for the issuance of a base quantity in its own name either as an old producer or as a producer with firm and substantial commitments for the production of celery, but rather acted in such a manner as to clearly imply that Sullivan, Inc. was to apply for and receive the base quantity, Chiglades cannot at this stage of events complain that base quantities were not apportioned equally among producers.

IS ORDER 967 UNCONSTITUTIONAL?

Chiglades has not attacked the constitutionality of an Act of Congress (see Jurisdiction, *supra*), and the Court has already held that Order 967 does not exceed the scope of authority granted by Congress (*supra*). Neither is Chiglades claiming it was denied procedural due process. But Chiglades does state that since the Florida Supreme Court held that since the Florida Celery and Sweet Corn Marketing Law was unconstitutional, Rabin v. Conner, 174 So.2d 721 (Fla. 1965) and since that statute was substantially similar to Order 967, the federal regulation should also be declared unconstitutional.

Order 967 was designed to fill the vacuum left after the Florida statute was held void, and sought to accomplish the same purpose: the limitation of the amount of celery to be marketed. Basically, the Florida Statute provided that:

> The celery segment of the agricultural industry in Florida is authorized to be accomplished, not by regulating the quantity of celery which may be produced, i.e., grown, but rather by controlling the quantity which may be marketed, i.e., placed in intrastate commerce, in the state in any prescribed period. This control

> may be exercised in one or more of three ways. First, the marketing order may prescribe the number of crates that each producer or grower may harvest and sell to or have sold by a handler. Second, it may prescribe the number of crates that each handler may buy from or handle for the producers. Third, it may prescribe the number of crates that each handler may sell, distribute, or handle in intrastate commerce, i.e., place in the "primary channel of trade." *Ibid,* p. 723.

New producers could acquire a permanent base quantity either by purchasing an existing one or by obtaining and operating under a temporary permit for three years. In the event that the latter method was utilized, the new producer was limited to a maximum allocation of 48,190 crates.

[10] Unlike the limitations imposed upon the Court in reviewing matters of fact, the Court is unlimited in its power to determine or pass on the constitutionality of a federal regulation, Baltimore & Ohio Railroad Co. v. U.S., 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed. 1209 (1936); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936); Ohio Valley Water Co. v. Ben Avon, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1934).

Although this Court is not bound by Florida law in this action, nevertheless, the Court deems it important to carefully consider the opinions of the Florida Supreme Court, and in this instance, particularly that Court's holding in Rabin v. Conner. We have already seen that Florida Celery and Sweet Corn Marketing Law is so similar to Order 967 both in its methods and ultimate purpose that a careful examination of that opinion would be relevant here.

[11] The Florida Supreme Court held that public policy in this instance did not necessitate a rigidly controlled monopoly. Since Order 967 has been accorded immunity

from anti-trust laws (*supra*) this argument need not concern us. The crux of the decision, however, was that new producers were arbitrarily discriminated against.

> It is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and a denial of equal protection of the law. So viewed, the marketing order is violative of Sections 1 and 12, Declaration of Rights, Florida Constitution and the Fourteenth Amendment to the United States Constitution.

7 U.S.C. § 608c(6) specifically authorizes such discrimination.

> [O]rders issued pursuant to this section shall contain one or more of the following terms and conditions, and . . . no others. . . .
>
> (B) Allotting, or providing methods for allotting, the amount of such commodity or product . . . which each handler may purchase from or handle on behalf of any and all producers thereof . . . under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative . . . to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

Again, the Court must find that Order 967 is within the scope of authority permitted by 7 U.S.C. § 608c.

> . . . In the context of a comprehensive complex administrative program, the administrative process must

have a reasonable opportunity to evolve procedures to meet the needs as they arise. . . . Richardson v. Wright, 405 U.S. 208, 92 S.Ct. 788, 31 L.Ed. 151.

The Court declines to pass upon the constitutionality of 7 U.S.C. § 608c because it lacks jurisdiction to do so (*supra*) and because the constitutionality of that statute has not been attacked.

IS THE COMPOSITION OF THE FLORIDA CELERY COMMITTEE SUCH AS TO DEPRIVE PLAINTIFFS OF DUE PROCESS?

[12] The Florida Celery Committee is composed of producers and handlers (or their employees) of celery nominated by producers and approved by the Secretary (§§ 967.26, 967.27). As producers and handlers of celery themselves, there can be little doubt that their motivation, at least in part, stems from self-interest. Assuming that this Committee had complete and unbridled control over celery production in Florida, Chiglades' contention that it was denied due process would possibly be justified.

But this is not the case. It is the Secretary of Agriculture:

1. Who actually selects committee members. § 967.32.
2. To whom recommendations and complaints are made. § 967.30.
3. Who limits the total celery to be handled during a marketing season. §§ 967.36, 967.38.
4. Who sets aside a reserve for those persons who desire to increase their base quantity or who have no base quantity. § 937.37.
5. Who issues other regulations to effectuate the policy of the marketing order.
6. Who hears and passes on all appeals from orders of the Florida Celery Committee.

The Secretary thereby regulates the regulators and it is his duty to insure that whatever excesses or arbitrary action may be indulged in by the Committee are curtailed. This check on the powers of The Florida Celery Committee appears to be an effective one.

CONCLUSION

For the reasons stated above, it is thereupon

Ordered and adjudged that defendant A. J. Sullivan of Florida, Inc.'s motion to dismiss and the Secretary of Agriculture's motion for summary judgment be and the same are hereby granted. It is further

Ordered and adjudged that the plaintiffs' motion for summary judgment be and the same is hereby denied. Counsel shall promptly prepare and submit a final judgment form. Costs will be taxed by the Clerk.

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Application of Chiglades Farm, Ltd., a Limited Partnership, for a Base Quantity under Marketing Order 967

Review of Florida Celery Committee's Determination

Preliminary Statement

On May 9, 1969, Chiglades Farm, Limited (Chiglades), filed its petition with the Florida Celery Committee (Committee) seeking a Base Quantity pertaining to Florida celery under the terms of Order No. 967 (7 CFR, Part 967). The Committee is responsible for the administration of Order No. 967 which regulates the handling of celery grown in the State of Florida.

In its application for a Base Quantity, Chiglades claimed, among other things, that it was entitled to the Base Quantity, either in whole or in part, which previously had been issued to and held by A. J. Sullivan of Florida, Incorporated (Sullivan Inc.). Subsequently, it was determined that a hearing should be held before the Committee, presided over by a Hearing Examiner, at which all evidence or claims which either Chiglades or Sullivan Inc. wished to present to the Committee would be received. By a notice dated June 12, 1969 (copy attached as "Ex. A"), both Chiglades and Sullivan Inc. were notified that a hearing would be held before the Committee and a Hearing Examiner of the Department of Agriculture. The notice also specified the procedures to be followed in the consideration by the Committee of Chiglades' Application for a Base Quantity. The rules and procedures for the hearing were as follows:

"1. The proceeding will be heard by the Florida Celery Committee and the Hearing Examiner sitting together.

However, the hearing shall be presided over by the Hearing Examiner.

"2. A verbatim transcript of the hearing will be made. Copies of such transcript will not be furnished by the Department but may be purchased by the parties from the reporter.

"3. The committee may place in the record such documents and other evidence which are presently before it and which it deems relevant to the matter involved.

"4. The hearing will be governed by the Department's Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 CFR 900.50 *et seq.*) to the extent deemed applicable by the Hearing Examiner. A copy of said Rules of Practice is enclosed. The parties will be afforded an opportunity to place their respective testimony and evidence in the record in accordance with these rules. All exhibits must be submitted in four copies.

"5. After the hearing briefs containing proposed findings of fact and conclusions may be filed by the parties.

"6. The Hearing Examiner will make recommended findings and a recommended decision on the matter.

"7. The parties may file exceptions to the Hearing Examiner's recommendations.

"8. The committee will then issue its decision taking into account the record made at the hearing, the Hearing Examiner's recommendations, and any exceptions thereto.

"9. Within 30 days after issuance of the committee's decision either party may request a review by the Secretary. Such request shall specify the grounds on which it is alleged that the committee's decision is not in accordance with law."

The oral hearing was held in Orlando, Florida, on June 19 and July 1 and 2, 1969. Mr. John G. Liebert, a Hearing Examiner of the United States Department of Agriculture presided over the hearing which resulted in a verbatim transcript of 597 pages and 59 exhibits consisting of approximately 350 pages. Subsequently, briefs were filed by both Chiglades and Sullivan Inc., and the Examiner issued recommended findings and a recommended decision on January 30, 1970. Exceptions were filed by both Chiglades and Sullivan Inc., and the Committee, acted upon all the information before it and determined on April 15, 1970, that Chiglades was not entitled to a Base Quantity. On May 15, 1970, Chiglades asked for a review by the Secretary of the determination by the Committee.

On June 19, 1970, Chiglades filed with the United States Department of Agriculture a petition purportedly pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (Act), along with an Applicaiton for Interim Relief. That petition challenged the validity of Order 967 on several legal grounds. On July 27, 1970, the petition was dismissed, on the grounds that Petitioner does not have a standing to sue pursuant to section 608c(15)(A) because it is not a handler subject to the marketing order. (A copy of the Judicial Officer's dismissal of that petition is attached hereto as "Exhibit B").

In view of the interrelationship between the Petition for Review of the denial by the Committee of Chiglades' Application for a Base Quantity, and the questions raised by Petitioner in its (15)(A) petition, rulings are made herein on the issues raised under both Chiglades' original review petition and the petition they unsuccessfully filed under section 608c(15)(A) of the Act.

In its Petition for Review of the denial by the Committee of its Application for a Base Quantity, Chiglades made the following contentions:

1. That the evidence received at the hearing does not support the determinations by the Florida Celery Committee that:

(a) Chiglades is not entitled to any of the Base Quantity presently held by Sullivan Inc.,;

(b) The issuance of a Base Quantity to Sullivan Inc., on January 20, 1966, was correct; and

(c) Chiglades' Application for a Base Quantity dated May 9, 1969, should be denied.

2. That the action by the Committee on April 15, 1970, violates the provisions of Order No. 967 because:

(a) It accords a Base Quantity to a corporation which is not a "producer" within the meaning of sections 967.6 and 967.130 of the Order;

(b) It denies a Base Quantity to a limited partnership which is entitled to such Base Quantity on the basis of its production record of celery for 1962-65 in accordance with sections 967.37 and 967.151 of the Order; and

(c) It denies a Base Quantity to a joint venture with a production record in contravention of section 967.37 and 967.130 of the Order.

3. That the action by the Committee on April 15, 1970, was illegal because it was made by persons who have a conflict of interest, on the basis of misrepresentations previously made before the Committee.

4. That the April 15, 1970, decision is illegal because it discriminates against farmers who did not hold Base Quantities prior to November 1965.

5. That the April 15, 1970, decision violates State law because it is based on a determination that celery from 1962 through 1965 belonged to Sullivan Inc.

In the petition which Chiglades unsuccessfully filed pursuant to section 608c(15)(A) of the Act, Chiglades made the following additional contentions:

1. That the Order is illegal because producer members of the industry control the celery industry of Florida in violation of the Due Process Clause of the Fifth Amendment of the Constitution and Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. That the Order is illegal because it violates the policy of the Act by perpetuating an illegal State program, and failing to protect the interest of the consumer;

3. That the Order is illegal because it is not in accordance with Section 8c(6)(B) of the Act which requires the apportionment of celery to be handled each growing season equitably among producers; and

4. That the actions of the Committee violate the Constitution and laws of the United States, and also the Act and the Order because the Committee and its members all hold Base Quantities, and therefore, there exists a conflict of interest in their actions, which have consistently been in their own self-interest.

As hereinafter more fully discussed, the various allegations by Chiglades are without merit.

Factual Findings on the Application By Chiglades for a Base Quantity

A thorough review has been made of the record of Chiglades' Application for a Base Quantity which was filed with the Committee on May 9, 1969. This Application resulted in a hearing in June and July, 1969, at which time Chiglades and Sullivan Inc. were provided a full opportunity to present and develop all the facts and circumstances relating to their respective contentions. On the basis of the record of such hearing, the Committee denied the Application, and Chiglades' petition for review of May 15, 1970, is an appeal from that denial. On the

present review of the record which was made as a result of Chiglades' May 9, 1969, Application for a Base Quantity, it is determined that the following findings of fact are pertinent and fully supported by the record herein. These findings are substantially the same as those made by the Hearing Examiner in his Recommended Decision, as adopted by the Committee.

1. On July 17, 1961, the Commissioner of Agriculture for the State of Florida promulgated Marketing Order No. 2 for Florida celery, pursuant to Chapter 573, Florida Statutes, F.S.A., known as "The Florida Celery and Sweetcorn Marketing Law." In pertinent part this marketing order provided that only those persons who were designated as "producers" could market celery grown in the State of Florida. A "producer" under the State marketing order was a person who produced and marketed celery during certain preceding seasons. Based upon this prior production and marketing history, a Base Quantity was assigned to each producer, which was the limitation placed on the quantity he could market. On May 12, 1962, an individual, A. J. Sullivan, a long-time producer of celery in the State of Florida, applied to the Commissioner of Agriculture for a Base Quantity under the Florida law. The Commissioner denied the application of Mr. Sullivan who appealed to the Courts requesting declaratory relief. The Circuit Court for Leon County, Florida, held that Sullivan was entitled to a Base Quantity under the State order based upon the average of his production during the 1958-1959 and 1959-1960 seasons. Subsequently, an appeal from this declaratory judgment was taken by the Commissioner of Agriculture. In a decision rendered on July 25, 1963, reaffirmed after rehearing on October 22, 1963, the District Court of Appeals of Florida (1st District) affirmed the decision of the Circuit Court of Leon County, granting Mr. Sullivan status as a "producer" with a fixed Base Quantity under the Florida law. (*Conner* v. *Sullivan*, 160 So. 2d 120).

2. On October 24, 1962, shortly after the decision of the Circuit Court of Leon County, three individuals, Paschal C. Reese, Thomas E. Sholts and Marion J. Hartinger, formed a corporation known as A. J. Sullivan of Florida, Inc. One of the general purposes of this corporation was to engage in farming operations. The authorized capital stock of this corporation was 2,500 shares of $1.00 per value stock. It has its principal place of business in the town of Belle Glade, Palm Beach County, Florida. At the time of its organization, certificates of stock were issued in the amount of 500 shares to A. J. Sullivan, and one share each to Paschal C. Reese and Marion J. Hartinger. A. J. Sullivan was President and Horace Unwin was Secretary-Treasurer of the corporation.

3. On October 29, 1962, several individuals formed a limited partnership known as Chiglades Farm, Ltd., pursuant to the Florida Limited Partnership Law. These individuals were Leo Bramson and Marvin J. Welfeld, general partners, and Barnard Bagan, Seymour Bagan, George D. Sax, Harold H. Harrison, Raymond L. Lutgert, Sherwin Shapiro, Robert H. Winer, Maurice A. Rosenthal, Alvin W. Cohn, and Sheldon Kaplan, all of Chicago, Illinois, and Eugene A. McCabe of Belle Glade, Florida, all as limited partners. As set forth in the limited partnership agreement, "The purpose of the partnership shall be to grow principally celery, or any other crops that may subsequently be selected on the land herein above mentioned, to cause and to participate in the growing of said crops with A. J. Sullivan, of Florida, Inc., a Florida corporation, as a joint venture."

4. On October 29, 1962, Chiglades leased certain farming land from Pioneer Land Company, a Florida corporation. This was the land referred to in the Chiglades Limited partnership agreement as the land on which it was proposed to produce celery.

5. On October 29, 1962, Chiglades and Sullivan Inc. entered into a contractual arrangement which the parties

termed a "Joint Venture Agreement." The stated purpose of this agreement was for "growing celery on approximately 260 acres of land located in Palm Beach County, Florida, pursuant to the aforesaid celery quota now held by A. J. Sullivan which will be transferred to A. J. Sullivan of Florida, Inc." The land referred to was the land leased from Pioneer Land Company and the celery quota that which was reflected in the Circuit Court of Leon County's opinion. Among other things, the agreement specifically recited that Sullivan owns a celery quota of 206,008 crates under Celery Marketing Order No. 1, State of Florida; that he owns substantially all of the capital stock of Sullivan Inc.; and that Sullivan shall undertake to have the Florida Celery Advisory Committee transfer such quota to Sullivan Inc. Other terms of the joint venture agreement provided that funds were to be contributed by Chiglades; Sullivan Inc. was to provide the equipment which it or A. J. Sullivan presently owned; the joint venture was to purchase or lease additional equipment required, provided, however, that additional equipment purchased would be the property of Chiglades; Chiglades was to purchase certain celery seed beds from a partnership (S & W Farms) in which A. J. Sullivan was a general partner; net profits of the operation were to be divided 20% to Sullivan Inc. and 80% to Chiglades; however, all the losses were to be borne by Chiglades; A. J. Sullivan was to be paid a weekly salary by the joint venture; H. E. Unwin was to keep the books of the joint venture and be compensated by it; a bank account was to be maintained in the name of the joint venture with checks to be signed and countersigned by any two of Edgar Wilder, H. E. Unwin and/or E. A. McCabe; as a pledge (for his performance) A. J. Sullivan was to assign all capital stock in Sullivan Inc. held by him to Chiglades; and, finally, all savings earned or retains deducted by the marketing cooperative (Pioneer Growers Cooperative) were to be paid or credited to Sulivan Inc., and thereafter distributed by Sullivan Inc. to the joint

venture. The agreement was executed on behalf of Sullivan Inc. by its president, A. J. Sullivan, and on behalf of Chiglades by its general partners.

6. On October 29, 1962, Chiglades entered into an employment contract with Edgar Wilder pursuant to which Wilder was to perform certain supervisory functions for it in connection with the planting and growing of celery by the joint venture. Wilder was to receive a portion of Chiglades' share of the net profits of the joint venture for his services. Wilder previously had been engaged in partnership agreements with the general partners of Chiglades.

7. Within a reasonable time following the date of the formation of Sullivan Inc., Mr. Sullivan transferred to Sullivan Inc., the Base Quantity held by him as an individual for the marketing of celery under the Florida Order. The provisions of the State Marketing Order allowed for such transfer of bases.

8. A. J. Sullivan did not at any time assign to Chiglades the shares of stock held by him in Sullivan Inc. He held these shares in his own name until the time of this death in April 1965.

9. Fritz Stein, Jr., a producer of celery, entered into an agreement with Sullivan Inc. on August 1, 1963, which agreement was amended on July 9, 1964, pursuant to which Sullivan Inc. was to grow celery for Stein. Such celery was grown for Stein on the same land on which the celery under the Base Quantity here in dispute was grown, at least through the 1965-66 growing season, and the sales of that celery were always made and accounted for by Pioneer Growers Cooperative to Stein, as the owner of the celery.

10. In December 1963, E. A. McCabe and H. E. Unwin each purchased 400 shares of the stock of Sullivan Inc., at a price of $1.00 per share. On Febrary 7, 1964, the five stockholders in Sullivan Inc., namely A. J. Sullivan (500

shares), H. E. Unwin (400 shares), H. A. McCabe (400 shares), Marion Hartinger (1 share), entered into a stockholders agreement whereby it was agreed that if A. J. Sullivan, H. E. Unwin or E. A. McCabe should die, the two survivors would have an option to purchase the stock of decedent at a price to be determined in a manner set forth in the agreement. Three days later, on February 10, 1964, A. J. Sullivan, E. A. McCabe and H. E. Unwin executed an additional stockholders agreement whereby it was provided that the remaining 1,198 shares of treasury stock of the corporation would not be issued except upon the unanimous consent of the parties to the agreement. It was further provided that if any one of the parties desired to sell his stock the remaining parties had an option to purchase it from the selling stockholder.

11. The corporation report and tax return of Sullivan Inc., filed on July 16, 1963, discloses that the officers of the corporation on February 6, 1963, were A. J. Sullivan, President; Paschal C. Reese, Vice-President; and Horace Unwin, Secretary-Treasurer. It also discloses that the directors were A. J. Sullivan, E. A. McCabe, and Edgar Wilder. Additional reports and testimony disclose that sometime prior to December 4, 1964, H. E. Unwin became a director in the corporation replacing Edgar Wilder, and that in May 1965, following the death of A. J. Sullivan, E. A. McCabe became President of the corporation. These changes in the directors and officers of Sullivan Inc. appear to be the only ones that have taken place since its inception.

12. Shortly after the execution of the joint venture agreement between Sullivan Inc. and Chiglades on October 29, 1962, Sullivan Inc. opened a bank account in the bank of Pahokee, Florida. The first deposit in this account appears to be November 13, 1962. On or about the same date, a second account in the name of Sullivan Inc. was opened in the same bank. It was exclusively a payroll account. Chiglades opened and maintained a bank account in the Bank of Pahokee, Florida, in its own name. These accounts

were used by the parties to the joint venture in the following manner:

The partners of Chiglades deposited their contributions to the partnership in the Chiglades account. Checks on this account were signed by Edgar Wilder and countersigned by Marvin Welfeld, a general partner. However, H. E. Unwin, the bookkeeper, had power of attorney from Weldfeld to countersign his name. This power of attorney was used extensively. Checks drawn on the account transferred operating funds to the main account of Sullivan Inc., in the Bank of Pahokee. The first deposit in the latter account of November 13, 1962, was an initial check for $10,000 from Chiglades to get the joint venture under way.

Checks on the main account of Sullivan Inc. in the Pahokee Bank were signed by H. E. Unwin and countersigned by Edgar Wilder until May 1964; after that date by H. E. Unwin and E. A. McCabe until sometime in October 1966, at which time the account and the payroll account were closed by transfer of the small remaining balances to the Chiglades account. Until the closing of this account in 1966 disbursements were made for all expenses relating to the production of celery under the joint venture, including taxes, licenses, fees, accounting, etc. After all the expenses of the joint venture business had been settled and income received, the proportionate share of the net profits for the season's operations were paid directly to Sullivan Inc., and to the partners of Chiglades in accordance with their distributive shares in the net proceeds of the joint venture as set forth in the agreement. Deposits in this account were received principally from Chiglades and, as previously stated, from Pioneer Growers Cooperative for the proceeds from the sale of celery and other crops. All income from the activities of the joint venture was deposited in this account. This account was, in reality, the operating bank account for the joint venture.

The payroll account in the Bank of Pahokee in the name of Sullivan Inc. was just that—a separate payroll account

relating to the operations of the joint venture. Deposits in this payroll account were made by checks drawn on the main account of Sullivan Inc. in the same bank. It is not clear from the record who signed the checks on the payroll account.

There was in existence a third account in the name of Sullivan Inc., the Florida National Bank of Belle Glade, Florida. This was the bank account where the separate funds of Sullivan Inc. were maintained. Deposits were made in this account for Sullivan Inc., share of the net profits of the joint venture and for other corporation business not related to the operations of the joint venture. Checks on this account were not under the control of Wilder, Unwin or Welfeld.

13. All of the celery produced by the joint venture was marketed by Pioneer Growers Cooperative pursuant to an agreement with Sullivan Inc. The cooperative kept its handler's records in this connection in the name of Sullivan Inc. All payments for sales made were paid to the corporation. Pioneer Growers at no time marketed celery for or in the name of Chiglades.

14. From the inception of Sullivan Inc., H. E. Unwin was the bookkeeper in charge of Sullivan Inc.'s, books. He was also the Secretary-Treasurer of Sullivan Inc. From its inception, Chiglades employed H. E. Unwin as its bookkeeper. He was also bookkeeper for Pioneer Growers Cooperative. On May 31, 1964, H. E. Unwin and E. A. McCabe were given shares of the net profits of Chiglades for additional services. It is clear, therefore, that Unwin and McCabe had access to all of the arrangements concerning Sullivan Inc., Chiglades, and the details of the joint venture. It does not appear that any separate books, as such, were kept in the name of Chiglades. Books were kept, however, by Unwin whereby the business of the joint venture and the funds utilized could readily be ascertained.

The joint venture agreement between Sullivan Inc. and Chiglades executed on October 29, 1962, provided for termination on June 30, 1963, with the right of the parties to continue the joint venture from year to year thereafter. The first season's operation sold only 83,730 crates of celery and resulted in a loss. At the suggestion of E. A. McCabe, Chiglades took in some additional limited partners on August 15, 1963, and amended the partnership agreement.

On July 11, 1963, Chiglades made a new agreement with Pioneer Land Company leasing additional land for the production of celery. This lease was similar to the one executed the previous year which had expired, excepting that it covered a three-year period, commencing from the first day of July 1963, and ending on the 30th day of June 1966. This would be effective for the crop years 1963-64, 1964-65, 1965-66. E. A. McCabe was the President of Pioneer Land Company and executed the lease on behalf of that company. This is the same E. A. McCabe who was a stockholder and director in Sullivan Inc., a limited partner of Chiglades, and Executive-Vice President of Pioneer Growers Cooperative.

16. On May 31, 1964, the parties to the joint venture executed an amendment to the original agreement by providing that the joint venture would cover a larger acreage under lease to Chiglades. It was on this same day, May 31, 1964, as previously mentioned, that Chiglades made an agreement with E. A. McCaibe and H. E. Unwin giving them as payment for additional services, shares in the net proceeds of the returns to Chiglades from the joint venture. This agreement provided that it would continue during the existence of the joint venture agreement between Chiglades and Sullivan Inc., and any other joint venture agreement which might be made by Chiglades. It was approximately at this time that Edgar Wilder became disassociated with Chiglades and from Sullivan Inc. Following the agreement of May 31, 1964, with Chiglades, E. A. McCabe was substi-

tuted as a person to sign or countersign checks on the account of Sullivan Inc. in the Bank of Pahokee.

17. On May 5, 1965, a decision of the Supreme Court of Florida in *Rabin* v. *Conner*, (174 So. 2d 721), in effect, nullified the Celery and Sweet Corn Marketing Law of Florida. As a consequence of this decision there was no regulation of the marketing of celery in the State of Florida after May 5, 1965, until the institution of a new Federal marketing order program regulating the marketing of celery which became effective on November 15, 1965.

18. On July 28, 1965, appropriate rule-making proceedings were commenced for the purpose of formulating a marketing agreement and order for the handling of celery under the Agricultural Marketing Agreement Act of 1937, as amended. As a result of these rule-making proceedings, the Assistant Secretary of Agriculture of the United States, George L. Mehren, on October 25, 1965, published a final decision and findings approving a producer referendum on the proposed marketing order. This decision appears in the Federal Register for October 28, 1965 (30 F.R. 13708). The Order, No. 967, became effective on November 15, 1965 (30 F.R. 14266). The Rules and Regulations issued pursuant to the Order were made effective on December 16, 1965 (30 F.R. 15416). In pertinent part these Interpretive and Administrative rules, particularly Sections 967.130 and 967.151, provide guidelines under which the Celery Committee is to make determinations on the eligibility of persons to receive Base Quantities under the regulation.

19. Under Order 967, provision was made in section 967.37(b) that producers with a prior history of celery production in Florida would be eligible to receive a Base Quantity under the Federal program. Two alternatives were permitted in showing such a history for computation purposes. A producer could receive a Base Quantity in the amount of the greatest number of crates of celery sold by or

for him during any one of the production seasons 1961-62 through 1964-65, or in an amount derived by computing the average of sales by or for him for any two of the seven production seasons 1958-59 through 1964-65. For producers who had no history of celery production in Florida during the seasons 1958-59 through 1964-65, or those whose Base Quantities based on sales during such period would not be representative of commitments, it was provided that a Base Quantity should be issued based upon commitments, so long as such commitments were, prior to September 30, 1965, firm and substantial, and the producer was actually engaged in the production of celery before that date.

20. A Florida Celery Committee was established under the new Federal Order No. 967, and George M. Talbott was named General Manager of the Committee. On November 19, 1965, Talbott, in accordance with the procedures outlined in Order No. 967, issued a notice to all Florida celery producers and other interested parties advising them of the necessity to register and supply information on appropriate forms provided to enable the Committee to have information necessary to allocate Base Quantities under the Order. On November 26, 1965, a copy of this notice, together with such forms, were sent by Mr. Talbott to Mr. Leo Bramson (general partner of Chiglades) at the request of E. A. McCabe. The notice stated the principal criteria for the establishment of Base Quantities. One of these criteria would be official shipment records of the Florida Celery Advisory Committee which had administered the State marketing order. It was additionally noted that any producer who, prior to September 30, 1965, had made a firm or substantial commitment for the production of celery, and who felt that the information contained in the form which was sent along with the notice was not representative of celery sales or anticipated production for the current season, should submit information on a supplemental form provided. Further, it was noted that any individual who had no record of celery sales during the preceeding seven

seasons, which would be used as the representative period for determination of base quantities, should submit pertinent information on a supplemental form provided. Form 100.65 was to be used by producers of celery who had a history of production during part or all of the period 1958-1959 through 1964-65. The producer was to provide information showing his sales by crate for each of the seven growing seasons, and the handlers of his celery production for each season. Form 200.65 was for use by producers with a history of production who desired to request adjustments to their history of sales based upon commitments because their sales were not representative during the period. The form provided for information pertaining to the date and type of commitment with verification from an independent source. Form 300.65 was to be used by persons who had no history of production, but who felt they were entitled to a base quantity based upon commitments to produce celery prior to September 30, 1965. The form provided for a great deal of information so that the Committee could determine whether such commitments had been made.

21. On November 24, 1965, Sullivan Inc. sent to the Florida Celery Committee its initial registration as a Florida celery producer on Form 100.65. This registration was signed by Horace Unwin, Secretary-Treasurer of Sullivan Inc. At the same time, Mr. Unwin, on behalf of Sullivan Inc., sent to the Committee, on Form 200.65, an application for adjustment of Base Quantity for the 1965-66 season. This application requested an additional Base Quantity on the basis of additional leases of land, and commitments made prior to September 1965, for the planting of seed beds. Form 100.65 showed the total number of crates produced and sold by Sullivan Inc., and/or its predecessor, A. J. Sullivan, an individual, for each of the seven base forming producing seasons. It showed production and sales of 291,434 crates in the 1958-59 season and 172,485 crates in the 1964-65 season, and further showed that in

each season the handler to which the celery was sold was Pioneer Growers Cooperative.

22. On December 1, 1965, Chiglades and Sullivan Inc. entered into a joint venture agreement. This agreement recited that the joint venture had been operating under a State quota owned by Sullivan Inc. prior to the invalidation of the State program by the Courts, and that the joint venture would continue to operate for the production of celery under a new Federal quota which had been applied for by Sullivan Inc. It further recited that the joint venture had already planted seed beds; that production would be on 750 acres of land leased from Pioneer Land Company by Chiglades; that Chiglades would contribute the necessary funds to the joint venture for the purpose of its operation; that Chiglades would provide all of the equipment which was to be used in connection with the growing of celery on the land; that the expense of the superintendent, Sam Chrissman, would be that of the joint venture; that Sullivan Inc. would be entitled to 7½ per cent of the net profits of the joint venture, but would not bear any part of the losses—the remaining net profit to go to Chiglades; that the books and records of the joint venture would be maintained by H. E. Unwin, who would be paid a salary of $125 a month at the expense of the joint venture; and that the funds of the joint venture would be deposited in a bank account in the name of the joint venture from which withdrawals would be made only upon the signatures of any two of the four named persons—H. E. Unwin, E. A. McCabe, Marvin J. Welfeld, and/or Leo Bramson. Additional provisions were that all savings earned or retains deducted by the Pioneer Growers Cooperative as a result of the operations of the joint venture should be paid or credited to Sullivan Inc., but would immediately be distributed to the joint venture, and that the joint venture might enter into agreements with any other grower or growers to grow celery for them under their quota, and to do so might increase the acreage needed

for such additional plantings. This joint venture agreement was signed by E. A. McCabe, President of Sullivan Inc., and by the two general partners of Chiglades. It was attested by H. E. Unwin, Secretary of Sullivan Inc. The term of the joint venture was to commence on June 30, 1965, and continue from year to year thereafter until terminated by the parties in a manner set forth in the agreement.

23. On January 7, 1966, George M. Talbott, General Manager of the Florida Celery Committee, after full deliberations of the Committee, including its examination of the official State records for the years when celery was under State regulation, notified Sullivan Inc. that it had been allocated a Base Quantity of 231,960 crates. This was computed pursuant to Federal Marketing Order 967 by averaging the two highest years of production and sales of Sullivan Inc., in the base period and/or its predecessor A. J. Sullivan, namely 291,434 crates for the 1958-59 season and 172,485 crates for the 1964-65 season. This is the Base Quantity which is in dispute in this proceeding. The Committee, after full deliberation, denied any adjustment of this Base Quantity based on the application by Sullivan Inc., which had been submitted to it on Form 200.65. The final Base Quantity issued to Sullivan Inc., thus was limited entirely to its record history of production and sales in the seven year base period. At the same time, January 7, 1966, Sullivan Inc. was further notified that it would receive an allotment of 200,244 crates for the 1965-66 season based on such Base Quantity of 231,960 crates.

On January 20, 1966, formal certificates evidencing the Base Quantity of 231,960 crates and the Marketable Allotment of 200,244 crates for the 1965-66 season were issued by the Committee to Sullivan Inc.

24. None of the forms supplied to the general partner of Chiglades were completed or submitted in the fall of 1965 to the Florida Celery Committee in connection with

the establishment of a Base Quantity under the Order. Nor was there any other communication from Chiglades or any of its partners, sent to the Committee in connection with, or supplying information with respect to, its operations in the production of celery.

25. E. A. McCabe was a member of the Marketing Sub-Committee of the Florida Celery Committee. This sub-committee was the one which recommended approval and adoption of the above-described forms which were utilized by the Committee, and referred to in the Notice. In addition, the sub-committee went over all of the applications for registration which had been submitted and made recommendations for the Base Quantity to be given each applicant in accordance with the information which was before the sub-committee. In the main, the recommendations of this sub-committee were adopted by the Committee.

26. On January 10, 1966, E. A. McCabe, as president of Sullivan Inc., submitted to the Committee a Producer Certification of Handler (Form 400.65), and indicated on the the form that 200,244 crates of the production of Sullivan Inc. would be handled by Pioneer Growers Cooperative. On August 19, 1966, H. E. Unwin filed with the Committee a Producer Certification of Handler indicating that Sullivan Inc. would produce celery (195,143 crates) to be handled by the Pioneer Growers Cooperative for the 1966-67 season. Form 400-65 was also filed by Sullivan Inc. for the 1967-68 and 1968-69 growing seasons. They showed that Sullivan Inc. expected to produce 195,382 crates of celery in the 1967-68 season and 195,571 crates in the 1968-69 season. Sullivan Inc. did, in fact, produce and sell celery in the 1966-67, 1967-68, and 1968-69 growing seasons. (The record of this proceeding does not reflect actual production and sales by Sullivan Inc. during the above three growing seasons. Official notice is taken of the records of the Committee which reflect these data).

27. For the 1965-66 crop year, which terminated June 30, 1966, operations relating to the payment and receipt of money, and the utilization of bank accounts, referred to above, remained substantially as described.

28. On August 4, 1965, E. A. McCabe, on behalf of Chiglades, made an offer to the Executor of the Estate of A. J. Sullivan, Mr. Pascal Reese, to purchase the celery equipment held in the inventory of the estate for $10,000. This offer was accepted by Mr. Reese and the title was transferred to Chiglades. Therefore, on November 24, 1965, all of the equipment used subsequently by the joint venture belonged to Chiglades exclusively.

29. Mr. Reese became the Executor of the Estate of A. J. Sullivan in April, 1965. Pursuant to the aforementioned stockholders agreement, Mr. Reese sold the 500 shares of stock of Sullivan Inc. held by A. J. Sullivan in equal parts to H. E. Unwin and E. A. McCabe. These shares were transferred to the parties at the time of the closing of the Estate.

30. On July 19, 1966, E. A. McCabe, President of Pioneer Land Company, sent Chiglades a copy of a new lease for an additional period of time. The previous lease had expired on June 30, 1966. This new lease was not executed by the parties. Sometime during the Spring of 1966, the general partners of Chiglades became aware that E. A. McCabe and H. E. Unwin were, in fact, the owners of Sullivan Inc. They believed that the stock transactions whereby these individuals had gained control of the corporation violated some arrangement they had between them. As a result of this disagreement, the joint venture between Sullivan Inc. and Chiglades was terminated sometime in June 1967. There was apparently some production under the joint venture agreement during part of the 1966-67 season under the general control and management of Chiglades. Termination was accomplished by cessation of operations and movement of Chiglades' equipment from the land on which celery had previously been grown.

31. On May 12, 1967, Chiglades, by Leo Bramson, general partner, filed an application with the Florida Celery Committee for the issuance of a Base Quantity for celery under the Order. This application listed as its history of production which was done pursuant to the joint venture agreement with Sullivan Inc. No mention was made in this application of the relationship which existed during the period involved between Chiglades and Sullivan Inc. The Committee, in a letter dated May 23, 1967, invited Mr. Bramson to a Committee meeting on June 13, 1967, for the purpose of giving any additional information which he desired in support of the application. Mr. Bramson did not attend the meeting, nor did any representative of Chiglades. On June 14, 1967, the Committee notified Chiglades that its application for a Base Quantity was denied.

On November 15, 1967, Mr. Bramson filed Form 400-65 (Producer Certification of Handler) with the Committee to cover production during 1967-68 season. This Form was returned with the notification that the Committee's records do not reflect a Base Quantity in the name of Chiglades Farm, Ltd. Subsequently, an attorney for Chiglades, Mr. B. F. Baty, Jr., of Palm Beach, Florida, advised the Committee by letter dated November 27, 1967, that "Chiglades is growing celery under contract with A. J. Sullivan of Florida, Inc., wherein the Sullivan corporation's quota is being used." The only other apparent communications between Chiglades Farm, Ltd., and the Committee were those in connection with the application under present consideration.

Conclusions

The Application for a Base Quantity made by Chiglades on May 9, 1969, must be denied. Based upon the evidence presented at the oral hearing in June and July, 1969, in Orlando, Florida, as shown by the Findings of Fact previously set forth herein, it is concluded that the action of the

Committee in denying that application was correct. Also, a review of the evidence reveals that Sullivan Inc. was entitled to the Base Quantity which the Committee issued to it in 1965, and to which Chiglades contends it is now entitled.

Section 967.37(b) of the Order set forth the bases on which a Base Quantity may be issued. They are:

1. A Base Quantity may be issued to a producer who had a history of celery production prior to the 1965-66 growing season either on the basis of the greatest number of crates of harvested celery sold by him or on his behalf during one of the four seasons, 1961-62 through 1964-65, or on the basis of the average of the greatest number of crates sold by him or on his behalf during any two of the seven seasons, 1958-59 through 1964-65;

2. In the case of a producer who, prior to September 30, 1965, had made firm and substantial commitments for the production of celery and was actually engaged in the production thereof, but who had no historical Base Quantity, or whose Base Quantity was not representative of such commitments, such producer could be assigned or have an adjustment in his Base Quantity;

3. Each marketing season the Committee, with the approval of the Secretary, may set aside a reserve for persons who request an increase in their Base Quantities, or who have no Base Quantity; and

4. A Base Quantity may be transferred from one producer to another in accordance with regulations established by the Committee, and in accordance with Section 967.39(a) of the Order, upon approval by the Committee.

An Application for a Base Quantity on either the basis of a history of production or firm and substantial commitments to produce celery prior to September 30, 1965, had to be filed with the Committee prior to December 20, 1965, in accordance with the procedural requirements set

forth in Section 967.151(a) of the Order. Since Chiglades did not make such an Application prior to that date, it has failed to meet that procedural requirement which was necessary to achieve the purposes of the program, to the extent it claims it is entitled to a Base Quantity because it has a history of production or because it had made prior firm and substantial commitments to produce celery.

In any event, Chiglades is not entitled to a Base Quantity, without regard to the lateness of its Application, because it has failed to sustain its burden of showing it is entitled to such a Base Quantity on one or more of the four bases set forth above.

Since Marketable Allotments have been less than the total of the Base Quantities held by producers, the Committee has not established a reserve since the inception of the Order. Thus, since there is and has been no reserve established by the Committee, Chiglades, as a new producer, is not entitled to a Base Quantity from a reserve. As regards the other three bases on which Chiglades might show an entitlement to a Base Quantity, it is clear that it has failed to do so on any of the three remaining grounds.

The record shows that Chiglades never produced celery, nor had it made firm and substantial commitments to do so, in its own capacity. Through the 1964-65 marketing season, Chiglades' only involvement in the production of celery was pursuant to a joint venture it had entered with Sullivan Inc. on October 29, 1962, which agreement was restated and reaffirmed, as modified, on December 1, 1965. The evidence shows that A. J. Sullivan, an individual, produced celery at least as early as the 1958-59 growing season, and that on the basis of his production history, he obtained, after litigation, a Base Quantity under the Florida State marketing order. The 1962 joint venture agreement was entered into between Chiglades and Sullivan Inc. to produce celery for market under the State Order base quantity issued to Sullivan. Pursuant to the terms of that agree-

ment, that base quantity was transferred from Sullivan to Sullivan Inc. in accordance with the terms of the State Order.

The 1962 agreement did not provide for the transfer of the base quantity by Sullivan Inc. to the joint venture, but rather the agreement contemplated that all rights to the base quantity would remain in Sullivan Inc. The intention of the parties that the Base Quantity should remain in Sullivan Inc., was restated and reaffirmed in the aforementioned 1965 agreement. That agreement expressly recited that Sullivan Inc. was to apply for a Base Quantity pursuant to the Federal Order. Sullivan Inc. did, in fact, apply for a Federal Order Base Quantity, and its Application was based upon the historical production record of Sullivan, the individual, and Sullivan Inc. for the 1958-59 through the 1964-65 period. Furthermore, that Application was made with the full knowledge of Bramson, a general partner of Chiglades. Chiglades was also expressly offered an opportunity to apply for a Base Quantity in 1965, but did not do so, relying instead on the fact that Sullivan Inc. was entitled to a Base Quantity, under which the joint venture could produce celery.

The terms of both the 1962 and the modified 1965 joint venture agreements expressly show that Chiglades never assumed producer status, but rather that the parties entered the agreements merely for the purpose of providing a method for growing celery under the Sullivan Inc. Base Quantity, with proportionate shares of any profits which might result therefrom, going to Sullivan Inc. and Chiglades. By the terms of both agreements, both parties were to retain ownership to any property contributed to the joint venture. As to the money contributed by Chiglades, its entitlement, first to 80% of the profits, and subsequently to 92½% of the profits which might result from the celery operation, show that it was being compensated for its investment in the joint venture.

In view of the facts set forth above, and heretofore stated, it is clear that Chiglades was not a producer, and that if it is entitled at all to a Base Quantity at this late date, it must be because as a result of the agreements, and the operation of the parties in the joint venture, it has derived a status as "producer" through that joint venture, or alternatively, it must be because it received a transfer of Sullivan Inc.'s Base Quantity by virtue of the terms of the joint venture agreements and the parties' actions pursuant to them. The facts cannot sustain such a result.

In addition to the facts surrounding Chiglades' relationship with Sullivan Inc., as set forth above and more fully stated in the Findings of Fact, there are other significant matters which show clearly that Sullivan Inc., and not Chiglades or the joint venture, was and is the producer entitled to the Base Quantity in issue. First, there was no provision in either agreement that the Base Quantity was to be jointly owned, and the 1965 agreement indicated that the Base Quantity was in fact to be held by Sullivan Inc. Second, sales of the celery from 1962 to the termination of the joint venture were at all times made by Sullivan Inc., through Pioneer Growers Cooperative as the handler, with the proceeds of the sales paid to Sullivan Inc. Under both agreements, savings earned and retains deducted were paid by Pioneer Growers Cooperative to Sullivan Inc., as the producer, and not to the joint venture or to Chiglades. Third, the 1965 modified agreements expressly provided that the joint venture would provide the same service with regard to the farming and growing of celery for other producers with a Base Quantity, as it was providing for Sullivan Inc. In fact, beginning in the 1963-64 growing season, celery was grown for Fritz Stein, Jr., on the same land as that on which Sullivan Inc's., celery was grown.

In view of the relevant facts, it is our conclusion that neither Chiglades nor the joint venture can show: (1) a history of celery production and marketing; (2) firm and

substantial commitments for the production of celery, and actual involvement in such production prior to September 30, 1965; or (3) that there was a transfer of Sullivan Inc's. Base Quantity either to Chiglades or the joint venture. Rather, the record is conclusive that Sullivan Inc., retained its status as a producer and its rights to its Base Quantity.

The only history of production involved herein is that upon which Sullivan Inc. applied for a Base Quantity, which application resulted in the issuance of such a Base Quantity of 231,960 crates of celery based upon the average of Mr. Sullivan's and Sullivan Inc.'s production in the marketing years 1958-59 and 1964-65. Chiglades did not exist in 1958-59. Chiglades' only involvement in the production of celery in later years was through its contributions to the joint venture. Therefore, Chiglades has no history of production of its own.

Chiglades has relied heavily on a contention that Sullivan Inc. misrepresented essential information to the Committee in 1965 in making its Application for a Base Quantity, which if it had been known by the Committee, would have resulted in the issuance of the Base Quantity either to Chiglades or the joint venture. In view of the record, we do not agree that there was either any misrepresentation, or that if all the information which has now been made available to the Committee were available to it in 1965, it would not have awarded a Base Quantity to Sullivan Inc. The propriety of the issuance of the Base Quantity to Sullivan Inc. on the basis of this record has been amply discussed above. As regards the allegations that misrepresentations were made to the Committee by Sullivan Inc., they were not. In accordance with the terms of the agreement between Chiglades and Sullivan Inc., Sullivan Inc. filed forms 100.65 and 200.65, as required by the Order for a producer claiming a history of production to support its application for a Base Quantity, and the information contained on these forms was entirely accurate. The Com-

mittee acted on the basis of the information contained in the Application and on other records such as the records of who held State Base Quantities, which State information verified the information on the Application.

Next, Chiglades cannot show it had made a firm and substantial commitment to produce celery and was actually engaged in the production of celery prior to September 30, 1965, as provided in Section 967.37(b) of the Order, which states in pertinent part that:

> "In the case of producers who prior to September 30, 1965, had made firm and substantial commitments for the production of celery and were actually engaged in the production thereof but who have no Base Quantities as determined on base period sales or whose Base Quantities based on such sales clearly are not representative of such commitments, the committee shall, by rules approved by the Secretary, provide for the assignment or adjustment of Base Quantities to such producers consistent with such commitments and as will be equitable to all producers."

As was seen above, Chiglades' only involvement in the production of celery was through the joint venture. The involvement of the joint venture in the growing of celery was based on the history upon which Sullivan Inc. received its Base Quantity rather than on a separate firm and substantial commitment to produce celery. At the inception of the program, Sullivan Inc. applied for an additional Base Quantity based on its allegations it had made firm and substantial commitments to produce celery, and was actually engaged in such production. This application was rejected by the Committee because there was no showing that such firm and substantial commitment had been made. Nor has Chiglades made such a showing now. Finally, in this regard, it is noted that applications based upon firm and substantial commitments to produce celery, and in-

volvement in the production of celery prior to September 30, 1965, were required to be made prior to December 20, 1965, pursuant to Section 967.151(a) of the Order, and therefore the time for making an application on this basis has long expired.

Neither has there been a transfer of the Base Quantity issued to Sullivan Inc. on the basis of its history of production, either to Chiglades or the joint venture. There has been no request for such a transfer on the part of Sullivan Inc., or approval by the Committee, as required by the Order. Therefore, such transfer must occur by virtue of the relationships between the parties, if at all. The contractual arrangements between Chiglades and Sullivan Inc. as set forth above, indicate clearly that it was agreed by the parties that Sullivan Inc. should remain the holder of the Base Quantity. The nature of the contractual arrangement was such as to show that the so-called joint venture was nothing other than an arrangement whereby the parties would make use of their individual assets for the profit of both. At all times, it was expressly stated and contemplated that each party would retain its assets as its own, individual property. This conclusion is reinforced by the fact that under the agreement, it was contemplated that the several assets brought together by that agreement could also be used to engage in the growing of celery for other producers who held a Base Quantity. This was done for Fritz Stein, Jr., who was not a party to the joint venture, but who was dealt with similarly to Sullivan Inc. in terms of his ownership of the celery produced.

In its application of May 9, 1969, Chiglades claimed it was entitled to a Base Quantity of 330,000 crates of celery. Of this amount, 172,485 crates is the same celery as that which Sullivan Inc. claimed in its application for a Base Quantity and furthermore is the same celery which was regulated by the State Order and grown under Sullivan Inc.'s State Order Base Quantity. We can see no basis

upon which Chiglades can now lay claim to that celery, especially since the joint venture agreement expressly recognized that for Base Quantity purposes, that celery was owned by Sullivan Inc.

Chiglades also contended that it was entitled to 157,515 crates of celery as a Base Quantity in addition to the 172,485 crates for which it claimed it had a history of production as a result of its relationship with Sullivan Inc. It made this claim on the basis of "its production record and its ability to farm and market celery . . . for its own venture and for Fritz Stein Farms between 1962 and 1967". As was seen previously, applications for a Base Quantity had to be made prior to December 20, 1965. For this reason alone, the Application dated May 9, 1969 should be denied as not being timely.

To the extent Chiglades has applied for a Base Quantity as a new producer because it claims to have a present capacity to produce celery, such Application is denied. Under the terms of the Order, new producers can receive a Base Quantity only in the event a reserve is established as provided for in Section 967.37(d)(1) of the Order, which states:

> "Each marketing season the committee, with approval of the Secretary, may set aside a reserve for persons who request an increase in their Base Quantities or who have no Base Quantity."

The Committee has not recommended the setting aside of a reserve for such new or additional Base Quantities since the Order was promulgated. The Secretary has concurred with these recommendations by the Committee because there has been no justification for such a reserve. Base Quantities were issued initially in a total amount of 9,223,520 crates of celery. The total Marketable Quantity of celery, which, as set forth in § 967.36(a) of the Order, is the total quantity of celery which handlers may handle

as first handlers for any marketing season, has not as yet approached the total of all Base Quantities. The total Marketable Quantity has never exceeded 87% of the total Base Quantities since the inception of the program. Such consistency in the Marketable Quantity is the result of the fact there is a limited demand for celery. Fresh market shipments for the 1965-66 season were 7,770,146 crates, for 1966-67, the figure was 7,349,958 crates, for 1967-68 there were 6,866,755 crates shipped, for 1968-69, it was 6,996,509 crates, and for the 1969-70 season approximately 6,132,630 crates were shipped.

This limited demand shows a definite need to restrict the handling of celery as has been done since the 1965-66 growing season. At some time in the future, sales of celery may warrant an increase in the total of all Base Quantities for the industry. At such time, it can be expected that there will be established a suitable reserve for new and additional Base Quantities to be issued on a fair and equitable basis.

One other matter needs to be discussed regarding this review. There have been raised on the record of this proceeding many allegations as to legal relationships between Chiglades and Sullivan Inc. However, since the questions raised deal with matters not related to the question of who is entitled to the Base Quantity, we need make no judgments on them except as otherwise set forth in this decision. In any event, it appears that the parties have taken such issues to the Florida State courts for reconciliation.

Other Questions Raised By Chiglades In Its Petition For Review

A number of other questions were raised by Chiglades in its Petition For Review which were not previously raised for consideration by the Committee. We shall answer them here.

First, Chiglades contends that the action of the Committee in denying it a Base Quantity violates the provisions of

Order No. 967 because Sullivan Inc. is not a "producer" within the meaning of the Order, because Chiglades is a producer, and because the joint venture is a qualified producer. All three of these contentions have been answered above, in the discussion of the merits of Chiglades' Application. It is clear that Sullivan Inc. was and is a producer, that Chiglades has never qualified for a Base Quantity as a producer, and the joint venture agreement by its terms precluded the joint venture from qualifying for a Base Quantity.

Next, Chiglades contends that the Committee's decision to deny Chiglades a Base Quantity was illegal because it was made by persons who have a conflict of interest, on the basis of misrepresentations previously made before the Committee. This contention has been partially answered above. There were no misrepresentations made to the Committee. Chiglades contends the denial by the Committee of Chiglades' application for a Base Quantity violates the law because all members of the Committee were disqualified from making the decision since they all were affected by a conflict of interest. This contention lacks merit. In order to assert this contention seriously, Chiglades should have raised this matter before the Committee made its decision, by bringing the contention into the open and demanding that each member disqualify himself, so that the question could be resolved prior to the determination by the Committee on Chiglades' entitlement. (See *Bower* v. *Eastern Airlines, Inc.*, 240 F.2d 623 (3d Cir., 1954); *North American Airlines* v. *C.A.B.*, 240 F.2d 867 (D.C. Cir., 1956)). Instead, Chiglades made scant mention of the possible conflict of interest of members of the Committee at the oral hearing, and failed to pursue the question until its Petition For Review. Also, those members who believed that they were affected by a conflict of interest disqualified themselves from considering and deciding upon Chiglades' Application. Other members of the Committee received no

guidance from Chiglades as to why they should disqualify themselves.

Section 967.37(d)(3) of the Order provides that the Committee shall grant or deny an Application for a Base Quantity, subject to the review by the Secretary of its decision. Section 608c(7) of the Act provides that orders may contain terms and conditions, including:

> "(c) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of any agency or agencies and defining their powers and duties . . ."

including the power to administer the order in accordance with its terms and provisions. The Secretary of Agriculture has determined that the proper agency to administer the Order is a committee of 15 members composed of producers and handlers of celery, or their employees. (See 7 C.F.R. 967.25 and 967.26). Since the Florida Celery Order is industrywide, and since the most knowledgeable persons as to the problems of the industry are growers and handlers of Florida celery, it follows that such persons are best qualified to administer an Order which is for the mutual benefit of the entire industry. Furthermore, the Secretary also provides in Section 967.81 of the Order that:

> "Each and every regulation, decision, determination or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time."

Effectively, the Secretary has reserved the right to review all Committee actions, thus assuring that any actions which might be influenced by conflicts of interest, among other considerations, can be reviewed by a disinterested party. The Secretary has exercised his right to review the Committee's decision in this proceeding.

Chiglades also contends that the Committee's decision is illegal because it allegedly discriminates against farmers who did not hold Base Quantities prior to November, 1965. This contention is discussed in our consideration below, of the questions presented by Chiglades' (15)(A) Petition.

Finally, Chiglades contends that the decision violates State law because it is based on a determination that celery in 1962 through 1965 belonged to Sullivan Inc. First, this is a Federal program, and we are not concerned here with State law. Second, the facts show that the celery grown from 1962 through 1965 did belong to Sullivan Inc.

Questions Raised In The (15)(A) Petition

In order to provide as comprehensive a review as possible of Chiglades' complaints regarding Order No. 967, it is desirable to rule here on the several additional challenges to the validity of that Order which Chiglades made in its Petition pursuant to Section 608c (15)(A) of the Act which was filed on June 19, 1970. This Petition was dismissed on July 27, 1970, because petitioner, as a non-handler, does not have a standing to bring such an action.

The first challenge made by Chiglades was that producer members of the industry have been granted total control over the industry under the provisions of the Order in violation of the Due Process Clause of the Fifth Amendment and Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). As was discussed above, members of the celery industry do not have such control over the industry because all actions of the Committee are subject to the review of the Secretary of Agriculture. However, the basic administration of the Order has been placed with the industry through the Committee because it possesses the necessary knowledge and capabilities to make those decisions which are necessary for an effective program which benefits the entire industry, and which benefits the public.

There is a short answer to the contention of Chiglades that industry control violates the Sherman Act. The purpose of a marketing order is to regulate an industry for the benefit of its members and the public by effectuating orderly marketing of the commodity involved. (See 7 U.S.C. § 601). The entire tone of the Act is one which intends that trade should be regulated under marketing orders, in accordance with the Act, to achieve the above-stated purpose. The involvement of the industry is in accordance with the Act (See Section 608c(7)). In addition, a specific exemption to the antitrust laws of the United Sates is provided in Section 608b of the Act. That section states:

> "In order to effectuate the declared policy of (the Act) . . . . , the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said sections." (7 U.S.C. 608b)

There is presently in effect such an agreement with virtually all handlers of celery grown in Florida. This agreement exactly parallels the Marketing Order. Furthermore, it is clear that it is the intent of the Act that marketing orders shall regulate the agricultural industry involved. Such regulation cannot be in violation of the antitrust laws because it has been undertaken in strict

conformity with the provisions of the Act. (See *U.S.* v. *Rock Royal Coop., Inc.*, 307 U.S. 533 (1939); *U.S.* v. *Maryland & Virginia Milk Producers Ass'n.* 90 F.Supp. 681, reversed on other grounds, 193 F.2d 907 (D.C. Cir., 1951).

Neither has there been any violation of the Due Process Clause of the Constitution. The hearing and review procedure accorded Chiglades in this matter were such as to assure that Chiglades had every opportunity to present its case. (*See Federal Communications Commission* v. *Pottsville Broadcasting Co.* 309 U.S. 134 (1940)).

Furthermore, the Celery Order was promulgated only after a full hearing in accordance with long-standing procedures established pursuant to the Act, in which all interested parties were afforded a full opportunity to present evidence which was pertinent to the program. The Decision of the Secretary as to need for such a program is fully justified by the evidence at that Hearing. (See Decision, 30 F.R. 13708, October 28, 1965; Recommended Decision, 30 F.R. 12474, September 30, 1965).

As regards the public interest, it is clear that this Order is in the public interest. The aforementioned Decision of the Secretary, as well as the 1968 Decision which amended the Order (See 33 F.R. 11648, November 15, 1968) fully set forth the reasons, based upon record evidence, why the Celery Order is necessary, desirable, and justified. One of the objectives of the program involved herein has been to tailor the supply of celery with the demand for it, and to effectuate such orderly marketing as is in the public interest.

With respect to the contention that the program itself is unconstitutional, there can be no doubt as to the constitutionality of the Act and Orders which are promulgated thereunder. (*United States* v. *Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939); *H. P. Hood & Sons, Inc. et. al.* v. *United States*, 307 U.S. 588 (1939); *Edwards* v. *United*

States, 91 F.2d 767 (9th Cir., 1937); *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir., 1938); *American Fruit Growers, Inc.* v. *United States*, 105 F.2d 722 (9th Cir., 1939); *Queensboro Farm Products, Inc.* v. *Wickard*, 47 F. Supp. 206 (1942), aff'd. 137 F.2d 969 (2d Cir., 1943); *United States* v. *Goldsmith Fruit Co.*, 19 F.Supp. 147 (S.D. Fla., 1947).

Chiglades has also contended that the Order is illegal because it violates the policy of the Act by perpetuating an illegal State program. We cannot agree. Questions concerning the predecessor State program have no bearing on Order No. 967. The program involved in this appeal was promulgated pursuant to Federal law, and once promulgated supersedes any State program which might conflict with it (See *Pearce* v. *Freeman*, 238 F.Supp. 947). (E. D. La. 1965).

Third, Chiglades contended the Order is illegal and discriminates against new producers because it allegedly is not in accordance with Section 608c(6)(B) of the Act which requires the apportionment of celery to be handled each growing season equitably among producers. Chiglades has misconstrued the law in this regard because it has read Section 608c(6)(B) of the Act as requiring that a Base Quantity program apportion celery (equitably among producers) on the basis of current quantities available for sale, and on no other basis. Such is not the case. Section 608(6)(B) expressly provides for allotment programs which limit the amount of a commodity a handler may purchase from or handle on behalf of any and all producers thereof "*based upon the amounts sold by such producers in such prior period as the Secretary determined to be representative, or* upon current quantities available for sale by such producers, *or* both" in a manner which is equitable to all producers. The fact that new growers may not achieve a Base Quantity until such time as increased demand warrants additional Bases is permissible because

the statute expressly authorizes a program which restricts the issuance of Base Quantities to producers who had sales in an earlier period. (See *Vaughn-Griffin Packing Co.* v. *Freeman*, 294 F.Supp. 458, (D.C., M.D., Florida, Orlando Div., 1968); affirmed *sub nom Vaughn-Griffin Packing Co.* v. *Hardin*, 423 F.2d 1094 (5th Cir., 1970)).

We are not aware of any laws of the United States which are violated by this Base Quantity program. As was shown above, the antitrust laws are not applicable. Furthermore, the courts have expressly upheld similar programs which restrict the marketing of a commodity under the Act as being constitutional, and not a deprivation of property without due process. (*United States* v. *Goldsmith Fruit Co.*, 19 F.Supp. 147 (S.D., Fla., (1947); *Whittenburg* v. *United States*, 100 F.2d 520 (5th Cir., 1938); *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir., 1938)).

The last contention made by Chiglades in its (15)(A) petition was that the actions of the Committee violate the Constitution and laws of the United States, and also the Act and the Order, because the members of the Committee are affected by a conflict of interest, and have consistently acted in their own self-interest. Much of this contention has been answered, above, in our discussion of similar allegations by Chiglades in its Petition For Review of the Committee's denial of its Application for a Base Quantity. In addition, we note that Chiglades appears to be attacking the motivation of the Committee in the performance of its duties. Such an attack must fail so long as the result achieved is otherwise lawful. As was shown above, the Order and actions taken by the Committee are lawful, particularly because ultimately all such actions are subject to the review of the Secretary. Thus, even if the Committee had improper motives in any action it has taken pursuant to the Order, the motives of the Committee are immaterial. (*Isbrandtsen-Moller Co., Inc.* v. *United States*, 300 U.S.

139 (1937); *Louisville & Jefferson Co. M.S.D.* v. *Joseph E. Seagram & Sons*, 211 S.W. 2d, (Ct. of App. Ken. (1948)); *Hammond* v. *Hill*, 131 F.2d 23, (D.C. Cir., 1942); *cert. denied* 318 U.S. 777 (1943)); *Combs* v. *United States*, 98 F. Supp. 749, (D.C. Vt., 1951).

CONCLUSION

In view of the above, it is concluded that Chiglades is not entitled to a Base Quantity, and the Florida Celery Committee's denial of its Application is upheld.

JOHN C. BLUM
John C. Blum
Deputy Administrator
Regulatory Programs

September 10, 1970

APPENDIX D

7 U.S.C. § 602. Declaration of Policy: Establishment of Price Basing Period: Marketing Standards: Orderly Supply Flow: Circumstances for Continued Regulation.

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to estab-

lish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

7 U.S.C. § 608b. Marketing Agreements: Exemption from Antitrust Laws.

In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of this chapter.

7 U.S.C. § 608c. Orders Regulating Handling of Commodity.

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations or producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * * * * * * *

(6) Other Commodities; Terms and Conditions of Orders.

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

* * * * * * * * * *

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

* * * * * * * * * *

(13) Retailer and Producer Exemption.

* * * * * * * * * *

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

* * * * * * * * * *

7 C.F.R. § 967.36 Marketable Quantity.

(a) Whenever the committee recommends and the Secretary finds on the basis of such recommendations or other information, that limiting the total quantity of celery to be handled during a marketing season, or revising a Marketable Quantity previousy established, would tend to effectuate the declared policy of the act, he shall establish the Marketable Quantity which handlers may handle as first handlers for such season, or revise a previously established Marketable Quantity.

(b) When a Marketable Quantity is established for any season, no handler may handle any harvested celery during

such season unless (1) it is within the Marketable Allotment of a producer who has a Base Quantity pursuant to § 967.38, and (2) such producer authorized the first handler thereof to purchase or otherwise handle it.

7 C.F.R. § 967.37 Base Quantities.

(a) Upon the request of the committee, after the effective date of this marketing order, each producer of celery shall register with the committee and furnish to it a report of the number of crates of harvested celery sold by him or on his behalf, broken down by crates, handlers and seasons, 1958-59 through 1964-65.

(b) A Base Quantity for each registered producer shall be determined by selecting (1) the greatest number of crates of harvested celery sold by him or on his behalf during one of the four seasons, 1961-62 through 1964-65, or (2) the average of the greatest number of crates of celery sold by him or on his behalf during any two of the seven seasons, 1958-59 through 1964-65. A Base Quantity shall be issued by the committee denoting this amount. In the case of producers who prior to September 30, 1965, had made firm and substantial commitments for the production of celery and were actually engaged in the production thereof but who have no Base Quantities as determined on base period sales or whose Base Quantites based on such sales clearly are not representative of such commitments, the committee shall, by rules approved by the Secretary, provide for the assignment or adjustment of Base Quantities to such producers consistent with such commitments and as will be equitable to all producers.

(c) The committee may recommend rules pertaining to producers who wish to obtain, hold, or transfer Base Quantities or Marketable Allotments. Such rules shall be subject to approval of the Secretary and may require producers to file reports and information with respect thereto, including but not limited to quantities marketed in the rep-

resentative period, their qualifications as producers, as well as particulars on sale and handling of celery as a result of any Base Quantities or Marketable Allotments that may be issued to them.

(d) (1) Each marketing season the committee, with approval of the Secretary, may set aside a reserve for persons who request an increase in their Base Quantities or who have no Base Quantity.

(2) The committee may recommend rules for establishing such reserve and for procedures whereby persons may apply for Base Quantities thereunder. Such rules shall be subject to approval by the Secretary. Rules may provide for open informal hearings by the committee on applicants' requests and may establish guides or standards for equitable and thorough consideration of pertinent factors relating to each case, including but not limited to past production of celery by applicant, acreage planted, average yields, the production capacity of the farm or land the applicant expects to use, land, labor and equipment available to applicant for celery production, economic and marketing factors, and other factors deemed pertinent by the committee.

(3) Each person filing an application hereunder for adjustment in or a new Base Quantity shall be notified by the committee of its determination thereon. Such determination and considerations appertaining thereto, shall be subject to review by the Secretary. If a Base Quantity is issued to an applicant hereunder, the requirements of § 967.38(c) shall then apply.

7 C.F.R. § 967.38 Marketable Allotments.

(a) When the Secretary establishes a season's Marketable Quantity, a percentage shall be determined by dividing the amount fixed as the season's Marketable Quantity by the total Base Quantities of producers. The result shall be the Uniform Percentage for any given season unless changed by a revised Marketable Quantity.

(b) The Marketable Allotment for each producer shall be established by the committee by multiplying his Base Quantity by the appropriate Uniform Percentage. The resulting amount shall be his Marketable Allotment for a season. The committee shall notify each producer of his allotment.

(c) After a producer has been notified of his Marketable Allotment, he shall, in turn, notify the committee, on forms furnished by it, the handler or handlers who will first handle all or a portion of his Marketable Allotment for the ensuing season, as well as the number of crates each such handler will so handle. This information shall be sent by the committee to the respective handlers.

(d) If the committee recommends and the Secretary approves, that no season's Marketable Quantity be established, the Marketable Allotment of each producer shall be unlimited.

(e) The Base Quantities of all producers whose Base Quantities are 37,500 crates or less shall be eliminated from both the Marketable Quantity and total Base Quantities when the Uniform Percentage is calculated in this section (§ 967.38(a)). The Uniform Percentage for such producers will always be 100 percent except when the Uniform Percentage calculated in this section (§ 967.38(a)) exceeds 100 percent in which event the higher percent shall be used.

7 C.F.R. § 967.152 Reserve for Base Quantities.

(a) Each season for which it recommends establishment of a Marketable Quantity under the provisions of § 967.36, the committee shall consider the need for a reserve for Base Quantities. Such consideration shall be directed to factors related to reserve needs, such as, but not necessarily limited to, the equitable apportionment of Base Quantities of celery among producers; and the need to meet additional demand for celery.

(b) The committee shall recommend to the Secretary, with its considerations and judgments thereon, the amount, if any, of harvested celery, in terms of crates, which should be established in a reserve for Base Quantities for the ensuing season. Such reserve may be calculated as a percentage of the total Marketable Quantity for a season or the then current Base Quantities, or shipments for a previous season or the average of shipments for two or more seasons, or on other similar basis to be determined by the committee with the Secretary's approval.

(c) The reserve, if any, for a particular season shall, for any season after the initial season, be established by the Secretary, pursuant to the committee recommendations or other available information, no later than the date of the establishment of Marketable Quantity.

(d) Applicants for Base Quantities or increases of Base Quantities, who have registered under § 967.151(a), may apply to the committee for a portion of such reserve within such time and on forms prescribed by it. The committee shall consider each application in accordance with § 967.151 (b) and the amount of celery needed to meet the Marketable Quantity or revised Marketable Quantity for the season, the historical supply available, and the decline or increase in volume of celery production by other producers; and, if approved thereunder, determine the Base Quantity for each such applicant.

(e) Any balance of the reserve which has not been distributed during a current season shall not carry forward into the following season.

APPENDIX E

No. 33974

SUPREME COURT OF FLORIDA

HAROLD J. RABIN and R. E. WATSON

Appellants,

v.

DOYLE CONNOR, as Commissioner of Agriculture of the State of Florida,

Appellee.

May 5, 1965.

* * * * * * * * * * *

O'CONNELL, Justice.

Appellants, Rabin and Watson, made application to the Florida Celery Advisory Committee for a temporary base quantity certificate to permit each appellant to produce and market 200,000 crates of celery during the 1964-65 season. Appellant Rabin received a temporary certificate permitting production and marketing of only 32,127 crates. Watson's application was denied.

Appellants then filed a complaint for declaratory decree in which they sought to have Chapter 573, F.S.1963, F.S.A., and Rule 7I-3, Rules of The Department of Agriculture, declared invalid and the Chancellor held that the statute and the rule were not unconstitutional or void as applied to the appellants and denied the relief sought. This appeal followed.

Chapter 573, F.S.A., originally enacted in 1959, is divided into three parts. We are concerned here only with Part I, entitled the "Celery and Sweet Corn Marketing Law."

In adopting this part of the act the legislature made extensive findings as to the problems facing the celery producers and the economic waste resulting therefrom. The legislature also declared the marketing of celery to be affected with a public interest and explained that the pro-

visions of the subject statute were "enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state." F.S. Sec. 573.02(3), F.S.A.

In Sec. 573.03 six purposes of the statute are set forth. What appears to be the basic purpose is stated as being "to enable celery * * * producers * * * with the aid of the state, to correlate more effectively the marketing of their agricultural commodities, with market demands therefor." The other purposes are stated to be: (1) to establish orderly marketing; (2) to provide for uniform grading and preparation for market; (3) to maintain present markets and develop new markets; (4) to eliminate or reduce economic waste in marketing and (5) to prevent, modify or eliminate trade barriers obstructing the free flow of celery to market.

Substantively the statute authorizes the Commissioner of Agriculture to regulate the marketing of celery through the issuance of marketing orders to be issued only upon approval by the number of handlers and/or producers prescribed in Sec. 573.11.

Among other things the statute, Sec. 573.17, provides that such a marketing order may contain provisions: (1) determining the existence of a surplus of celery, providing for its control and distribution, and equalizing the burden of its elimination, when necessary; (2) limiting the total quantity of celery which may be distributed or handled in the primary channel of trade (i.e., from the time of harvesting to time it leaves intrastate and enters interstate commerce) during any specified period; (3) allotting the quantity of celery which each handler may purchase from all producers; (4) allotting the quantity of celery which each handler may distribute or handle; and (5) allotting the quantity of celery which each producer may sell or have handled for his account. We do not list the other provisions permitted to be contained in a marketing order

because they do not bear directly on the decision of this case.

As can be seen from the foregoing paragraph, the regulation of the celery segment of the agricultural industry in Florida is authorized to be accomplished, not by regulating the quantity of celery which may be produced, i.e., grown, but rather by controlling the quantity which may be marketed, i.e., placed in intrastate commerce, in the state in any prescribed period. This control may be exercised in one or more of three ways. First, the marketing order may prescribe the number of crates that each producer or grower may harvest and sell to or have sold by a handler. Second, it may prescribe the number of crates that each handler may buy from or handle for the producers. Third, it may prescribe the number of crates that each handler may sell, distribute, or handle in intrastate commerce, i.e., place in the "primary channel of trade."

All of the terms used in this opinion are defined in the statute and are used in accordance with the statutory definition.

Following enactment of ch. 573 the Commissioner of Agriculture promulgated the marketing order, Rule 7I-3, which, as amended in 1962, is the order under attack here. Insofar as relevant here, this order did three things: (1) it established the celery growing seasons of the years 1960-61 and 1961-62 as the representative or base period to be used in determining the "permanent base quantities" that would be allotted to the producers of celery; (2) it fixed permanent base quantities only for those persons who had grown celery during the representative period, 1960-61 and 1961-62, the quantites allotted being calculated on the amounts each produced during that period; and (3) despite the absence of statutory authority therefore, it provided for the award of "temporary base quantities" to new producers, i.e., to persons who had not produced during the base

period 1960-61 and 1961-62. These provisions will be described in greater detail below.

Appellants, Rabin and Watson, did not produce celery during the base period 1960-61 and 1961-62, and therefore did not qualify for permanent base quantity certificates. Appellant Watson, however, alleged that he had for 18 years grown, produced and marketed celery in South Florida.

As stated earlier each of the appellants applied for a temporary base quantity of 200,000 crates. Appellants were 2 of 17 applicants for temporary certificates, the requests totalling 1,395,000 crates. Temporary certificates, each for 32,127 crates, were issued to Rabin and 5 other applicants. The other applications were denied.

[1] On this appeal the appellants contend that: (1) the marketing order is not in compliance with ch. 573 which authorizes its issuance; and (2) that the marketing order and the statute are both violative of both the Florida and United States Constitutions.

The first contention is easily answered in the negative. Subseqent to the promulgation of Rule 7I-3, ch. 63-123, which now appears as F.S. Sec. 573.28, F.S.A. was adopted by the legislature. This section of the statute affords to any marketing order issued pursuant to ch. 573 and in effect at the time of its passage a conclusive presumption of conformity with the statute unless found to the contrary by the Commissioner, which he has not done. For present purposes, at least, we consider this amendatory statute as virtually incorporating into ch. 573 all outstanding market orders, in the absence of contrary action by the Commissioner.

[2] The attack on the constitutionality of the order and the statute is more difficult of decision. This assault is three pronged. It is argued: *first*, that both the statute and the order contravene the commerce clause of Article

1, Section 8 of the Federal Constitution; *second,* that they constitute an unwarranted exercise of the police power of the state and therefore violate the due process and equal protection guarantees found in Sections 1 and 12, Declaration of Rights, Florida Constitution, F.S.A., and in the Fourteenth Amendment to the Federal Constitution; and *third,* that they constitute an unlawful delegation of legislative power.

Inasmuch as the issue for decision directly involves only the regulation of the marketing of celery by producers, we will limit our discussion to those portions of the statute and marketing order which affect producers of celery as distinguished from handlers. A brief study of that portion of the statute directly involved, Sec. 473.17(1)(d), will assist in pointing up the fatal defect which we detect in that subsection of the statute and in the marketing order.

As stated above, the main thrust of the marketing order was to allocate permanent base quantities to those who produced celery during the 1960-61 seasons. Rule 7I-3.09 (2). However, Section 7I-3.06(3) of the marketing order provides that the base quantities are to be "based upon the current season's production or sales, or sales of such producers, to the end that the total quantity of such celery * * * so purchased from or handled * * * shall be apportioned equitably among all such producers." Thus, it appears that the allotments of base quantities were not made on the basis prescribed in the marketing order itself, i.e., on a basis of current season's production or sales.

Prior to its amendment by Chapter 63-123, Laws of Florida, F.S. Section 573.17(1)(d) F.S.A., which authorized the regulation of production by allotments to producers, provided that such allotments were to be "based upon the current season's production or sales, or sales of such producers," the identical basis provided in Section 7I-3.06(3) of the marketing order. Chapter 63-123 then amended F.S. Section 573.17 (1)(d), F.S.A. to read that allotments to

producers were to be based (1) upon the amounts of celery placed in the primary channel of trade by such producers in a prior period which the Commissioner finds to be representative, or (2) upon the current season's productions or volume sold, or (3) upon both (1) and (2), so as to apportion equitably among all producers the total quantity of celery permitted to be sold.

As first adopted, and as it now stands, Section 7I-3.06 (3) of the marketing order was consistent with the statute, Section 573.17(1)(d), prior to its amendment in 1963. The actual allotment of the base quantities under the marketing order, Section 7I-3.09, was never in conformity with Sec. 7I-3.06(3) of the order and was not in conformity with the statutory authorization until the amendment of the statute in 1963. It is apparent that what happened is that the statute was amended to make it conform to Section 7I-3.09 of the marketing order rather than making the marketing order conform to the statute.

Other aspects of the marketing order must be detailed. Section 7I-3.09 of the order determined that permanent base quantities should be allotted on the basis of the production or sales of producers during the 1960-61 and 1961-62 seasons, which the Commissioner found to be a "representative period." The order then proceeded to allot permanent base quantities totaling 7,710,482 crates to some 36 firms and individuals. Several of the certificate-holders bear the same family name. The quantities allotted range from a low of 3,920 crates to a high of 2,017,011 crates to one firm or person. Five of the certificates account for more than one half of the total quantity allotted.

In addition to the permanent base quantities allotted, the order established a base quantity reserve to be utilized for issuance of temporary base quantity certificates upon application therefor by new producers prior to May 15th of each year. Such base quantity reserve would, for the season 1963-64, be 2½% of the total permanent base quan-

tities and thereafter would be an amount not to exceed 2½% of the said base quantities. Said temporary certificates could be renewed if the holder produced under them. After three successive years of production under a temporary certificate the holder is entitled to receive a permanent base quantity certificate equal to the average number of crates sold by him during the three years. Although permanent certificates are transferable, temporary certificates are personal to the holder and not transferable. No more than 25% of the 2½% base quantity reserve may be assigned to any one applicant. Here it must be noted that the provision in the order for temporary certificates is without statutory authorization.

It appears that the permanent base quantities allotted under the order are fixed and may be changed only by amendment to the order.

[3] In determining the validity of legislation and orders of the kind involved here, the vital factor to be considered is the practical effect and impact thereof. Eskind v. City of Vero Beach, Fla. 1963, 159 So.2d 209, 212. The practical effect of this marketing order is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny any other persons the right to participate in this lawful enterprise on any reasonably large scale basis, and to deny others the right to participate at all.

As noted above, the permanent base quantity certificates are fixed on a basis of production and sales during the two seasons 1960-61 and 1961-62. The only way for a new producer to acquire a permanent certificate is to purchase an existing one or to obtain and operate under a temporary certificate for three years.

Moreover, the total quantity available for temporary certificates is uncertain, but in no event more than 2½% of 7,710,842 or 192,762 crates. Since no temporary certifi-

cate may be issued for more than 25% of the base quantity reserve the most that any temporary certificate holder may be allotted is 48,190 crates. Assuming that any sizeable number of persons applied for such permits each would be limited to a smaller share of the base quantity reserve and some would (as in the instant case) be altogether prohibited from producing celery.

It is true that the statute apparently leaves it to the Commissioner to change the representative period by advancing the years or seasons selected as the base. But this would provide no real opening for new producers. The continued enforcement of the order would effectively prevent their ever achieving the production, during any subsequent period, that would qualify them for any large scale production or sale under a permanent certificate. For example, if the representative period were to be advanced from the 1960-61 and 1961-62 seasons to the 1964-65 season its only effect would be to grant to those temporary certificate producers in that year a permanent certificate for all or some portion of the meagre quantity of celery each was permitted to produce in that year. Those persons who did not produce under temporary certificates during the 1964-65 season (or in any other period chosen) would gain nothing by a change in the representative period.

[4] It is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and a denial of equal protection of the law. So viewed, the marketing order is violative of Sections 1 and 12, Declaration of Rights, Florida Constitution and the Fourteenth Amendment to the United States Constitution. To the extent that it author-

izes the unconstitutional result of the marketing order, Part I of ch. 573 is also invalid. Inasmuch as the marketing order seems to regulate only the producers of celery, no direct attempt to regulate handlers or distributors being made, the only provision of the statute specifically involved in this ruling is Sec. 573.17(1)(d).

In deference to the legislative authority we are required to uphold the act and the marketing order if there be any reasonable basis upon which to do so. Similarly, we are bound to hold to a minimum any judicial disturbance of the legislative product. For these reasons we do not decide the more basic question of whether the state, in the exercise of the police power, may or may not regulate the quantity of celery which may be sold by or handled for producers in this state. It is unnecessary that we do so because as above stated we find the manner of regulation employed in the statute and the marketing order to be invalid for the reasons above stated.

It is pertinent to note here that the California statute from which ch. 573 appears to have been adapted not only does not authorize allotments on the basis of past production, but does not authorize any allotments which focus on the producer. Deering's California Codes: Agricultural, Sec. 1300.15 (1962). Thus, that statute contains no provision comparable to Sec. 573.17(1)(d), although it has provisions comparable to Sec. 573.17(1)(c) and (e).

[5-7] No authority need be cited for the proposition that activity deemed inherently harmful to the public welfare may be prohibited, or that the state may establish rigidly controlled monopolies when the public interest warrants. But we find in the commercial production of celery no activity warranting its prohibition nor has this activity the character of a public utility that would justify its treatment as a controlled monopoly. The cases refusing to permit this kind of interference in the pursuit of an ordinary and legitimate use of property, in the absence of a clear

requirement of the public interest, are legion. The following are a few: Liquor Store v. Continental Distilling Corp., Fla. 1949, 40 So.2d 371; Town of Bar Harbor Islands v. Schlapik, Fla. 1952, 57 So.2d 855; Larson v. Lesser, Fla. 1958, 106 So.2d 183; Stadnik v. Shell's City, Inc., Fla. 1962, 140 So.2d 871; City of Miami Beach v. Seacoast Towers-Miami Beach, Fla.App. 1963, 156 So.2d 528.

The appellee does not contend that the production of celery directly affects the public interest. He argues, rather that such regulation is essential to the economic health of the celery industry and that the health of this industry affects the economy of the state, the local governments where celery is grown, and the welfare of those persons employed in the industry. He points out that the number of producers has increased since the regulation commenced. He states that during the three seasons prior to the invocation of the order, the f.o.b. Florida price of celery was $1.42, $1.69 and $1.71 per crate, respectively, whereas in the three seasons under the order the price has risen to $3.47, $2.10 and $2.76 per crate, respectively. This illustrates well that the regulation has been of benefit to those permitted to produce celery, and is strong evidence in favor of a planned and controlled agricultural economy. Nevertheless, it does not overcome or satisfy the infirmities above described.

For the foregoing reasons we hold those portions of the marketing order and the statute which authorize and award allotments of base quantities on the basis of production in a prior representative period to be unconstitutional and void.

The decree appealed from is reversed and the cause remanded for further proceedings consistent with this opinion.

DREW, C. J., and THOMAS, ROBERTS, THORNAL, CALDWELL and HOBSON (Retired), JJ., concur.

Supreme Court
FILE
APR 10
MICHAEL RODAK,

IN THE

Supreme Court of the United States

No. 73-1360

LEO BRAMSON and MARVIN WELFELD, individually and as Trustees for themselves and the limited partners of CHIGLADES FARM, LTD., *Petitioners,*

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, and A. J. SULLIVAN OF FLORIDA, INC., a Florida Corporation, *Respondents.*

BRIEF IN BEHALF OF A. J. SULLIVAN OF FLORIDA, INC. IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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April 10, 1974

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INTRODUCTORY

As set forth herein, A. J. SULLIVAN OF FLORIDA, INC., a Florida corporation, the Respondent who is and has been a Florida celery producer, opposes the issuance of writ of certiorari herein as sought by Petitioners. Its position is that no consideration exists (as set out in Rule 19 or otherwise) for a review of this cause by this Court.

Review is sought by Petitioners of the decision of the Court of Appeals for the Fifth Circuit, October 10, 1973, 485 F.2d 1125 (set out at pages 1a-16a of Petitioners' Appendix A).

That decision affirmed the summary judgment decision of the Southern District of Florida, August 1, 1972, 346 F.S. 935 (Petitioners' Appendix B)—which held against Petitioners on all points raised, and affirmed the decision of the Secretary of Agriculture of September 10, 1970 (not reported)—copied as Petitioners' Appendix C.

The District Court's decision was that the findings and conclusions of the Secretary's decision ("Review of Florida Celery Committee's Determination") be affirmed, and that there is no merit to any of the Petitioners' contentions.

The Secretary's decision was in a proceeding entitled "Application of Chiglades Farm, Ltd., a Limited Partnership, for a Base Quantity under Marketing Order 967", dated September 10, 1970 (not reported—but set out in full as Petitioners' Appendix C.[1]

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[1] "In its application for a Base Quantity, Chiglades claimed, among other things, that it was entitled to the Base Quantity, either in whole or in part, which previously had been issued to and held by A. J. Sullivan of Florida Incorporated". (App. C—p. 35a)

"On May 9, 1969, Chiglades Farm Limited (Chiglades) filed its petition with the Florida Celery Committee (committee) seeking a Base Quantity • • • ". (App. C—p. 35a)

"The one hearing was held in Orlando, Florida, on June 19 and July 1 and 2, 1969 (before a Hearing Examiner and the Committee) • • • (and)

"The Examiner issued recommended findings and a recommended decision on January 30, 1970. Exceptions were filed • • • and the Committee, acted upon all the information before it and determined on April 15, 1970, that Chiglades was not entitled to a Base Quantity." (App. C—p. 37a)

That proceeding included a decision adverse to Petitioners by the Hearing Examiner, a second adverse decision by the Florida Celery Committee, and as stated above a final adverse decision by the Secretary of Agriculture on Review. Thus, there have been five decisions adverse to Petitioners on the factual and legal issues, viz: (1) by the Hearing Examiner, (2) by the Florida Celery Committee, (3) by the Secretary of Agriculture, (4) by the U.S. District Court for the Southern District of Florida, and (5) finally, by the Court of Appeals for the Fifth Circuit.

PETITIONERS' QUESTIONS PRESENTED

There is no basis in the Record for this Court to become involved in the considerations posed by Petitioners' "Questions Involved". They are:

(1) Whether Marketing Order for Celery Grown in Florida is authorized by the Federal Statutes, the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(6)(B).

(2) Whether additional consideration should have been given by the Secretary to "antitrust consequences", even though the statute (7 U.S.C. 608b), expressly provides a specific exemption to the antitrust laws (7 U.S.C. 608b), and the Secretary found, as did both Courts, that the Marketing Order was not "in violation of any of the antitrust laws of the United States"—see Appendix 2 hereto, and Petitioners' Appendix B (p. 27a) and Petitioners' Appendix A (p. 16a).[2]

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[2] USDC (p. 27a) "Chiglades also contends, however, that the Secretary had an affirmative duty to consider anti-trust implications by determining whether the anticompetitive effects of Order 967 are justified by public need. Carnation Co. v. Pacific West-

It is pertinent to note that nowhere in the proceedings in the Courts below nor in this Court do Petitioners in any wise challenge the validity of the statute—but to the contrary they concede it. Initially, they sought the unwarranted transfer of the Base Quantity of Sullivan, Inc. to Chiglades. Failing that, they sought (in 1969) an unauthorized new Base Quantity for Chiglades. And, as a last resort, they challenge Marketing Order 967 as being a departure from the terms of the statute. Only if they fail to obtain the benefits accorded to celery producers (as well as the entire celery industry and the consuming public) under Order 967, do they seek to have that Order declared invalid.

In their phraseology of Question No. 1, Petitioners err in their statement of fact, viz: Order 967 "is vir-

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bound Conference, supra and Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 88 S.Ct. 1005, 19 L.Ed.2d 1071 (1968) construed the Shipping Act of 1916 and held that only limited immunity from the anti-trust laws was provided for in the Act and the Federal Maritime Commission's own formula of 'public interest' was the proper standard. These cases are distinguishable from the case at bar. The anti-trust exemption provided by 7 USC § 608b is clear, unequivocal and unlimited. No prior determination by the Secretary is required. Order 967 is thus exempt from the anti-trust laws." Court of Appeals (p. 16a): Antitrust Problems. Under 7 U.S.C.A. § 608b,

The making of any such (marketing) agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful.

Plaintiffs maintain that, insofar as Marketing Order No. 967 exceeds its statutory authority, this antitrust immunity is inapplicable. Having found no abuse of authority, however, we must conclude that the immunity is undisturbed. Where such total immunity is granted, there can be no violation of the antitrust laws. See Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973).

tually *identical* to a Florida state celery marketing program" etc. Such is not the fact. The Florida order regulated producers; neither the Federal Statute nor the Federal Marketing Order 967 regulates producers but only handlers in interstate commerce. The District Court noted that "Section 608c does not actually regulate producers *in their capacity as producers*" (p. 28a of Pet. App. B). The Court of Appeals also noted that although the Florida Statute "was similar in objectives and mechanics to the Federal Marketing Order, there is one crucial difference" (Pet. App. A p. 74a) and "the base quantities are not, as plaintiffs allege, 'perpetual transferrable licenses' which operate to preclude entry of new producers into the industry" (p. 13a). And the Court of Appeals quoted as follows from *Mulford* v. *Smith,* 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939):

> "The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota." 307 U.S. at 47, 59 S.Ct. at 652.

STATEMENT OF CASE

On July 9, 1965, proceedings were initiated by the Secretary of Agriculture with respect to the issuance of a Federal Marketing Order with respect to Florida celery. After public hearings, and affirmative votes by producers and handlers of Florida Celery, Marketing Order 967 was duly issued effective November 15, 1965.

In 1962 a limited partnership under Florida law, Chiglades Farm, Ltd. was formed by Leo Bramson and Marvin Welfeld as general partners and Eugene

McCabe and others as limited partners. This limited partnership entered into a joint venture agreement, December 1, 1965, with A. J. Sullivan of Florida, Inc. (referred to as Sullivan), with respect to the production of celery by Sullivan, its marketing and accounting for net profits. The Joint Venture Agreement recited:

> "Whereas, Sullivan has applied for a federal quota slightly in excess of 300,000 crates; and
>
> "Whereas, the joint venture will operate under this new quota;"

Pursuant to the joint venture, Sullivan, Inc. duly registered its marketed production in previous years and received from the Florida Celery Committee (the administrative agency appointed by the Secretary) its Base Quantity Certificate. This "Base Quantity" is simply the registered volume of sales of each producer, on which the marketable allotment may be figured which can be sold or marketed by an authorized handler. It is pertinent to note that without such registration, there would have been no means of assuring that the policy of the Act (7 U.S.C. 608c(6)) could not have been implemented—"Allotting or providing methods for allotting the amount * * * (of celery) * * * which each handler may purchase from or handle on behalf of all producers thereof * * * under a uniform rule based upon the amounts sold by such producer in such prior period as the Secretary determines to be representative * * * to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers." During the ensuing seasons of 1965-66 and 1966-67, Sullivan, Inc. produced celery pursuant to the joint venture, and

marketed its allotment through Pioneer Growers Co-operative, who sold and accounted to Sullivan, Inc. therefor.

Chiglades did not file any report with the Committee prior to December 1965 (as required by the Order), and in fact filed nothing until May 12, 1967, when it filed an application for Base Quantity, which was denied by the Florida Celery Committee.

Celery production and marketing pursuant to the joint venture terminated about the end of the 1966-67 celery season. Meanwhile, on January 12, 1967, the general partners of Chiglades Farm, Ltd. filed suit in the Circuit Court of Palm Beach County, Florida (Ex. 42 of Administrative Record R.1359-1384), which was decided adversely to Chiglades on September 27, 1967, and appeal therefrom to the Fourth District Court of Appeals was dismissed on April 5, 1968.

Another suit was filed in the Circuit Court of Palm Beach County, Florida, on August 12, 1967 by the general partners of Chiglades, which suit was voluntarily dismissed on January 17, 1968. See footnote to Decision of Court of Appeals, 5th Circuit, p. 5a of Appendix A of Petition.

On December 5, 1967, Eugene A. McCabe filed complaint against all partners of Chiglades seeking an accounting and dissolution of the limited partnership. Final Judgment of Dissolution was entered on April 21, 1970, by the Circuit Court of the 15th Circuit of Florida, and affirmed by the Fourth District Court of Appeals of Florida, and petition for certiorari was dismissed by the Supreme Court of Florida.

It should be noted that such State Court action in its entirety, including the Dissolution of Chiglades, ante-

dated the filing of Complaint herein in the District Court of the District of Columbia (later transferred to Southern District of Florida).

On May 9, 1969, Chiglades requested a Base Quantity; and this letter was the origination of the proceeding before the Secretary of Agriculture, the latter's decision of September 10, 1970, the U.S. District Court (S. Dist. of Fla.) Appendix B, and the Court of Appeals' decision of October 10, 1973—Petitioners' Appendix A.

NO REASON FOR GRANTING PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

It is erroneously stated on page 7 of Petition that "the decision of the court of appeals on the producer quota issue is in conflict with this Court's opinion in *Stark* v. *Wickard,* 321 U.S. 288, 303 (1944)." To the contrary, the only issue determined therein was that the petitioners there "have shown a right to a judicial examination of their complaint." This Court in *Stark* v. *Wickard,* at 321 U.S. 311, 88 L.Ed. 748, said:

> "It hardly need be added that we have not considered the soundness of the allegations made by the petitioners in their complaint. The trial court is free to consider whether the statutory authority given the Secretary is a valid answer to the petitioners' contention. We merely determine the petitioners have shown a right to a judicial examination of their complaint."

To the contrary as stated by the Court of Appeals (Petitioners' Appendix A p. 8a):

> "Weighing these facts, the District Court concluded that the Secretary's decision that the base quantity should remain with the Sullivan corpora-

tion was neither arbitrary, capricious, nor unsupported by substantial evidence. We agree."

Also, (Pet. App. A p. 10a):

"The District Court found that '(s)ince present and past demand for celery has been limited, an increase in the total base quantities for the industry (permitting issuance of a reserve quota) is currently unwarranted,' and the Secretary's refusal to grant one met the substantial evidence standard."

And (Pet. App. A p. 11a):

"To justify the Marketing Order, the Secretary of Agriculture distinguished between the permissible regulation of the amount which a producer may sell to a handler and the prohibited regulation of the amount a producer may grow. * * * the Supreme Court has found such a distinction valid under the Agricultural Adjustment Act. In Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939), * * * the Court upholding the regulatory system, found that '(t)he statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota.' 307 U.S. at 47, 59 S.Ct. at 652."

See, also, *Sec'y of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 70 S.Ct. 403, 94 L.Ed. 381 (1950).

NO VALID ANTITRUST CONTENTION

A complete answer to all contentions by Petitioners respecting antitrust regulation, is the "clear, unequivocal and unlimited" exemption contained in 7 U.S.C. 608b.

The discussion thereof in the Secretary's decision on Review is set forth in Appendix 2 hereto, for convenience.

The consideration thereof by the District Court, is contained on pages 26a and 27a of Petitioners' Appendix B.

And the decision of the Court of Appeals is succinctly set forth on page 16a of Petitioners' Appendix A.

Nothing further need be said.

THE FLORIDA DECISIONS

Although in this Court, Petitioners seem to have abandoned their claim to the Base Quantity of A. J. Sullivan of Florida, Inc., under Federal Marketing Order 967, they now raise here only two questions, one as to the validity of the entire Order 967 and two as to antitrust considerations (despite the express statutory exemption under 7 U.S.C. 608).

Petitioners make the argument that Federal Order 967 is invalid because a 1965 decision of the Supreme Court of Florida held certain features of a Florida Celery Marketing Order to be invalid. (See Petitioners' Appendix E, pages 81a-90a). The concluding part of the Florida Court's opinion in *Rabin* v. *Conner*, May 5, 1965, 174 So.2d 721-726 was:

> "This illustrates well that the regulation has been of benefit to those permitted to produce celery, and is strong evidence in favor of a planned and controlled agricultural economy. Nevertheless, it does not overcome or satisfy the infirmities above described.
>
> "For the foregoing reasons we hold those portions of the marketing order and the statute which

authorize and award allotments of base quantities on the basis of production in a prior representative period to be unconstitutional and void." (p. 90a Pet. App. E).

Both the District Court (App. B pp. 30a-33a) and the Court of Appeals (App. A pp. 13a-15a) in substance held that the Florida decision as to the Florida Marketing Order was neither controlling nor persuasive as to the validity of Federal Marketing Order 967. In addition to what was said by the Courts below, it is proper to add that where Congress has exercised its power to legislate with respect to Interstate Commerce, the Federal legislation is exclusive. And, as otherwise herein noted, the decisions of this Court are to the effect that both the Federal Statute 7 U.S.C. 601 etc. and Marketing Order 967 are valid.

There were other State Court decisions shown by the record.

Sullivan initially grew celery in 1939. He obtained his quota under the Florida Marketing Order, as the result of a decision of the Circuit Court of Leon County, Florida, affirmed July 25, 1963 in *Conner* v. *Sullivan,* 160 So. 2d 120.

The District Court (Pet. App. B p. 30a) noted that Federal "Order 967 was designed to fill the vacuum left after the Florida statute was held void".

The Court of Appeals took notice of three additional State Court actions (footnote App. A p.4a, 5a). These three suits were:

1. Complaint by Leo Bramson and Marvin J. Welfeld, general partners of Chiglades Farm, Ltd. v.

Eugene A. McCabe, filed January 12, 1967 in the Circuit Court of the Fifteenth Judicial Circuit of Florida, Palm Beach County. Final Decree against Chiglades was entered September 27, 1967, and the appeal by Bramson and Welfeld to the District Court of Appeal, Fourth District of Florida, was dismissed by that Court on April 5, 1968.

2. Complaint by Leo Bramson and Marvin Welfeld, general partners of Chiglades Farm Ltd. v. A. J. Sullivan of Florida, Inc. was filed August 16, 1967 in Circuit Court of Palm Beach County, Florida and dismissed by plaintiffs on January 17, 1968.

3. Complaint by Eugene A. McCabe v. Leo Bramson and Marvin J. Welfeld (and the limited partners of Chiglades Farm, Ltd.) was filed December 5, 1967, in the Circuit Court of Palm Beach County, Florida—seeking a dissolution of the limited partnership and an accounting. Final Judgment of Dissolution was rendered on April 21, 1970. That final judgment of dissolution was affirmed by the District Court of Appeal, Fourth District of Florida, and petition for certiorari was dismissed by Supreme Court of Florida.

See pages 4-7, Brief of Appellee, A. J. Sullivan of Florida, Inc. before Court of Appeals.

The Complaint herein was not filed in the District Court of the District of Columbia until October 19, 1970—just two days short of six months following Decree of Dissolution. And—A. J. Sullivan of Florida, Inc. was not made an additional party until May 1971—more than a year after dissolution.

It would seem on well established principles of law that the State Circuit Court, which first acquired juris-

diction of the parties should be permitted to proceed with its accounting procedures, without the parties being compelled at the same time to defend a certiorari in the Supreme Court.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be dismissed. This would leave in force the conclusion of the Secretary of Agriculture, viz:

> "With respect to the contention that the program itself is unconstitutional, there can be no doubt as to the constitutionality of the Act and Orders which are promulgated thereunder. (United States v. Rock Royal Coop., Inc., 307 U.S. 533 (1939); H. P. Hood & Sons, Inc. et al v. United States, 307 U.S. 588 (1939); Edwards v. United States, 91 F.2d 767 (9th Cir., 1937); Wallace v. Hudson-Duncan & Co., 98 F.2d 985 (9th Cir., 1938); American Fruit Growers, Inc. v. United States, 105 F.2d 722 (9th Cir., 1939); Queensboro Farm Products, Inc. v. Wickard, 47 F.Supp. 206 (1942), aff'd. 137 F.2d 969 (2d Cir., 1943); United States v. Goldsmith Fruit Co., 19 F.Supp. 147 (S.D.Fla., 1947)."

Respectfully submitted,

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A. J. Sullivan of Florida, Inc.

APPENDIX 1

Excerpts from Secretary of Agriculture decision on review of Florida Celery Committee's Determination (set out in full in Petitioners' Appendix C, pages 35a-72a).

Page 56a:

An Application for a Base Quantity on either the basis of a history of production or firm and substantial commitments to produce celery prior to September 30, 1965, has to be filed with the Committee prior to December 20, 1965, in accordance with the procedural requirements set

Page 57a:

forth in Section 967.151(a) of the Order. Since Chiglades did not make such an application prior to that date, it has failed to meet that procedural requirement which was necessary to achieve the purposes of the program, to the extent it claims it is entitled to a Base Quantity because it has a history of production or because it had made prior firm and substantial commitments to produce celery.

In any event, Chiglades is not entitled to a Base Quantity, without regard to the lateness of its Application, because it has failed to sustain its burden of showing it is entitled to such a Base Quantity on one or more of the four bases set forth above.

* * *

The record shows that Chiglades never produced celery, nor had it made firm and substantial commitments to do so, in its own capacity. * * *

Page 58a:

The terms of both the 1962 and the modified 1965 joint venture agreements expressly show that Chiglades never assumed producer status, * * *

Page 59a:

In view of the facts set forth above, and heretofore stated, it is clear that Chiglades was not a producer, • • •

• • •

In view of the relevant facts, it is our conclusion that neither Chiglades nor the joint venture can show: (1) a history of celery production and marketing; (2) firm and

Page 60a:

substantial commitments for the production of celery, and actual involvement in such production prior to September 30, 1965; or (3) that there was a transfer of Sullivan Inc.'s Base Quantity either to Chiglades or the joint venture. Rather, the record is conclusive that Sullivan Inc., retained its status as a producer and its rights to its Base Quantity.

• • •

Therefore, Chiglades has no history of production of its own.

• • •

Page 65a:

• • • It is clear that Sullivan Inc. was and is a producer, that Chiglades has never qualified for a Base Quantity as a producer, and the joint venture agreement by its terms precluded the joint venture from qualifying for a Base Quantity.

• • •

APPENDIX 2

Discussion in order of Secretary of Agriculture on review of Florida Celery Committee's determination (set out in full in Petitioners' Appendix C) as to anti-trust.

Page 68a:

There is a short answer to the contention of Chiglades that industry control violates the Sherman Act. The purpose of a marketing order is to regulate an industry for the benefit of its members and the public by effectuating orderly marketing of the commodity involved. (See 7 U.S.C. § 601). The entire tone of the Act is one which intends that trade should be regulated under marketing orders, in accordance with the Act, to achieve the above-stated purpose. The involvement of the industry is in accordance with the Act (See Section 608c(7)). In addition, a specific exemption to the antitrust laws of the United States is provided in Section 608b of the Act. That section states:

> "In order to effectuate the declared policy of (the Act) . . ., the Secretary of Agriculture shall have the power * * * The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: (7 U.S.C. 608b).

There is presently in effect such an agreement with virtually all handlers of celery grown in Florida. This agreement exactly parallels the Marketing Order. Furthermore, it is clear that it is the intent of the Act that marketing orders shall regulate the agricultural industry involved. Such regulation cannot be in violation of the antitrust laws because it has been undertaken in strict conformity with the provisions of the Act. (citations).

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1360

LEO BRAMSON, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 17a-34a) is reported at 346 F. Supp. 934. The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 485 F. 2d 1125.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1973. Mr. Justice Powell timely extended the time for filing a petition for a writ of certiorari to March 9, 1974, and the petition was filed on March 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a marketing order issued by the Secretary of Agriculture limiting the amount of celery produced in Florida that a handler of celery may market is contrary to the provision of the Agricultural Marketing Agreement Act of 1937 barring regulation of a producer "in his capacity as a producer."

2. Whether the marketing order was validly issued when the Secretary failed to consider asserted anticompetitive objections to the order which were not raised in the rulemaking proceeding and were not voiced by petitioners until long after the order had issued.

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. 608b provides:

> *Marketing agreements; exemption from antitrust laws.*
>
> In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided,* that no such agreement shall remain in force after the termination of this chapter.

7 U.S.C. 608c provides in pertinent part:

> (6) In the case of the agricultural commodities and the products thereof * * * specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:
>
> * * * * *
>
> (B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.
>
> * * * * *
>
> (13) * * *
>
> (B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

Celery Marketing Order No. 967 is set forth in 7 C.F.R. Part 967.

STATEMENT

In 1962, A. J. Sullivan, a Florida celery producer, was given a marketing quota known as a base quantity under a state celery marketing order. After Sulli-

van incorporated his business as A. J. Sullivan of Florida, Inc. ("Sullivan Inc."), several individuals, including petitioners, formed a limited partnership called Chiglades Farm, Ltd., for the purpose of growing celery in a joint venture with Sullivan Inc. (R. 1280–1281). The joint venture agreement provided that Sullivan's marketing quota would be transferred to Sullivan Inc. (R. 1273–1277).

In May 1965, the Supreme Court of Florida held that the state celery marketing order and portions of the state statute exceeded the scope of the state's police power, and therefore violated both the state and federal constitutions. *Rabin* v. *Conner*, 174 So. 2d 721. Subsequently, the Secretary of Agriculture commenced appropriate rulemaking proceedings for the purpose of considering and formulating a federal marketing agreement and order for the handling of celery under the Agricultural Marketing Agreement Act of 1937. 30 Fed. Reg. 8648. Marketing Order No. 967, promulgated after public hearings were held, became effective in November 1965. 30 Fed. Reg. 14266.

Under the federal order and a concomitant marketing agreement, a Florida Celery Committee, composed of producers[1], employees of producers, handlers,[2] or employees of handlers (7 C.F.R. 967.26),

[1] A "producer" is a person engaged in a proprietary capacity in the production of celery. 7 C.F.R. 967.6.

[2] A "handler" is a person who, on behalf of himself or a producer of celery, "handles" harvested celery, *i.e.*, purchases harvested celery from a producer or sells or transports harvested celery within Florida or from Florida to points outside Florida. 7 C.F.R. 967.5, 967.7, 967.8.

recommends to the Secretary the total amount of celery to be marketed in a current season. If the Secretary finds that limitation of the total amount of celery to be "handled" (see p. 4, *supra,* n. 2) in a marketing season (or revision of a previously established limitation) would tend to effectuate the policy of the Act, then the Secretary may limit (or revise the existing limitation on) the total quantity of celery that handlers may handle, as the first handler thereof, for the current season. 7 C.F.R. 967.36 (a). This total quantity that may be handled in a current season is referred to as the "Marketable Quantity." 7 C.F.R. 967.13. The Committee then allocates the Marketable Quantity by giving each producer a "Marketable Allotment" for the season, which constitutes the maximum amount of harvested celery that may be purchased from, or handled on behalf of, that producer. 7 C.F.R. 967.14, 967.38(a), (b). No limitation is imposed on the amount of celery that a producer may produce or harvest.

The Marketable Allotment of a producer is determined by reference to the "Base Quantity" of the producer (7 C.F.R. 967.38(a), (b)), which is itself determined by reference either to the amount of harvested celery sold by the producer during the seasons from 1958 to 1965, or, in the case of producers whose sales were nonexistent or unrepresentative during that period, to firm and substantial commitments made prior to September 30, 1965, for the production of celery. 7 C.F.R. 967.37(b).

Sullivan Inc. applied for and received a Base Quantity under the federal order. Although Chiglades was sent a separate application form, it did not apply for a Base Quantity, but continued to participate in the joint venture under a new agreement specifying that the venture would operate under Sullivan Inc.'s Base Quantity (R. 1764, 1766).

Chiglades terminated the joint venture in 1967. Beginning in May 1967, Chiglades requested in a series of administrative applications that it be awarded a Base Quantity of its own. After hearings the applications were denied.

Petitioners then filed this action (in the United States District Court for the District of Columbia, which transferred it to the United States District Court for the Southern District of Florida), seeking the assignment to Chiglades of a permanent Base Quantity on the basis of its alleged production history. Alternatively, petitioners urged that the 1965 marketing order and agreement, both on their face and as applied, were unconstitutional and also violated the Agricultural Marketing Agreement Act and the antitrust laws. The district court granted summary judgment for the Secretary, holding (1) that the order and agreement are constitutional, (2) that they are not contrary to the Marketing Agreement Act, and (3) that there was no violation of the Sherman Act because the Marketing Agreement Act specifically provides that marketing agreements approved by the Secretary do not violate the antitrust laws. 7 U.S.C. 608b. The court of appeals affirmed (Pet. App. 1a–16a).

ARGUMENT

1. Petitioners contend that the allotment of Base Quantities limiting the amount of celery that a producer may sell to a handler violates 7 U.S.C. 608c(13)(B), which prohibits the Secretary from issuing any marketing order applicable to a producer "in his capacity as a producer."

Under 7 U.S.C. 608c(6)(B), among the limited number of conditions that the Secretary must consider for inclusion in a marketing order are conditions

> [a]llotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers * * *.

This language specifically authorizes the Secretary to allot the amount of a commodity that may be purchased by handlers from producers. The base quotas in issue here are precisely such allotments.[3]

When subsections (6)(B) and (13)(B) of 7 U.S.C. 608c are read together, as they must be (*Federal Power Commission* v. *Panhandle E. Pipeline Co.*,

[3] The Florida state court decision in *Rabin* v. *Conner*, 174 So. 2d 721, has no application here. The Florida court held that the statutory scheme constituted an unwarranted exercise of the state's police power, and a denial of due process. *Rabin* has no bearing on the power of the federal government to regulate the marketing of agricultural commodities under the Commerce Clause of the Constitution, nor on whether the Secretary's exercise of the powers conferred by Congress was consistent with applicable Acts of Congress.

337 U.S. 498, 514), the statute authorizes regulation of the amount which a producer may *sell* to a handler, but prohibits restriction on the amount a producer may *grow*. See *Cranberry Prods., Inc.* v. *Hardin*, No. 71-C-139 (W.D. Wis.), decided October 16, 1972.

The distinction between production and marketing was recognized in *Mulford* v. *Smith*, 307 U.S. 38, where it was alleged that the Agricultural Adjustment Act of 1938 imposed improper controls on the production of tobacco. Under that Act, a quota was apportioned to the farms on which the tobacco was grown. Penalties were placed on warehousemen who marketed tobacco from a farm in excess of the farm's quota. In upholding this statutory scheme, the Court held (307 U.S. at 47):

> The statute does not purport to control production. It sets no limit upon acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse.

Thus, control of the celery market through limitations on the amount of celery handlers may purchase is in full accord with the statutory authority in Section 608c(6).

Petitioners' argument that the Agricultural Marketing Agreement Act may not be applied so as to affect producers indirectly is based on a misreading of 7 U.S.C. 608c(13)(B). That section provides that mar-

keting orders may not apply to a producer "in his capacity as a producer." The effect of this provision is not to bar regulation of producers in the *sale* of their product but only in its production. Petitioners' broader interpretation of this provision would render the entire marketing agreement program virtually unworkable, for almost any effort to implement the policy of the Marketing Agreement Act of establishing such orderly marketing conditions as will establish parity prices to farmers (7 U.S.C. 602(1))[4] will necessarily have some effect upon producers.

The history and evident purpose of Section 608c (13)(B) indicates that it should not be given an expansive application. The provision first appeared in the Agricultural Adjustment Act Amendments of 1935 (Section 5, 49 Stat. 753), which replaced a provision for licensing of handlers established by Section 8(3) of the Agricultural Adjustment Act of 1933 (48 Stat. 35) with the present system of marketing orders. (The 1935 amendment was "validated" and reenacted without material change in the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), as "not having been intended for the control of the production of agricultural commodities," after this Court had held other parts of the Act unconstitutional. See *United States* v. *Butler*, 297 U.S. 1.)

[4] Section 602(1) provides that it is the policy of Congress, [t]hrough the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

The legislative history of the 1935 amendment indicates that Congress intended to vest the Secretary with "the full extent of the Federal power over interstate and foreign commerce and no more * * * in connection with [marketing] orders." H. Rep. No. 1241, 74th Cong., 1st Sess., p. 8; S. Rep. No. 1011, 74th Cong., 1st Sess., p. 9; see *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 124–125. That history contains no evidence that Section 608c(13)(B) was intended to protect "producers" from regulation as a matter of policy. Rather, the provision that no order should apply to a producer "in his capacity as a producer" was nothing more than an effort to tailor the statute to then-prevailing notions as to the limits on the commerce power, under which it was thought that Congress could not "regulate agricultural production." *United States* v. *Butler, supra*, 297 U.S. at 68; see *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 542–550; *Hammer* v. *Dagenhart*, 247 U.S. 251, overruled in *United States* v. *Darby*, 312 U.S. 100; cf. *Mulford* v. *Smith, supra*, 307 U.S. at 47–48. See also *Wickard* v. *Filburn*, 317 U.S. 111, sustaining Congress' power to regulate local agricultural production in the course of the regulation of interstate commerce. Given Congress' express intention to vest the Secretary with the full power over commerce, Section 608c(13)(B) must be regarded as providing, in substance, that marketing orders shall not affect producers in their capacity as producers if to do so would

exceed Congress' power over commerce, a claim which cannot plausibly be made here.[5]

2. Petitioners also contend that Marketing Order No. 967 and the related marketing agreement are invalid because in approving them the Secretary failed to consider their alleged anticompetitive effects of perpetuating control over celery production in Florida by a small group of producers and preventing new producers from entering the market.[6] Petitioners, however, did not raise these antitrust contentions in the rulemaking proceedings that preceded the adoption of the marketing order.[7] The Secretary has advised us that had those contentions then been presented, they would have been considered. In the circumstances, we

[5] The dictum in *Stark* v. *Wickard*, 321 U.S. 288, 303, cited by petitioners (Pet. 10), is not to the contrary. There the Court held only that producers of milk had standing to challenge an order of the Secretary making certain deductions from the minimum prices due to milk producers selling to handlers covered by the order, pursuant to 7 U.S.C. 608c(5). As Justice Frankfurter noted in his dissent, "[o]f course the statute concerns the interests of producers * * *," notwithstanding Section 608c(13)(B). 321 U.S. at 316.

[6] The marketing order in fact authorizes the Committee and the Secretary to set aside a reserve for persons who have no Base Quantity. 7 C.F.R. 967.37(d). Such a reserve has not yet been set aside, however, because, due to an excess of supply over demand, the total Base Quantities have exceeded the Marketable Quantity each season. *E.g.*, 38 Fed. Reg. 22371.

[7] Petitioners have not brought before the courts in this case the record of the 1965 rulemaking proceeding that resulted in adoption of the challenged marketing order and agreement. We are advised by the Secretary, however, that the antitrust objections now being voiced by petitioners were not raised in that proceeding by petitioners or by anyone else. The Secretary's order does reflect consideration of a variety of other competitive factors. 30 Fed. Reg. 14266.

submit that petitioners cannot now be heard to complain about the Secretary's failure to consider the alleged anticompetitive effects of the order.

Petitioners apparently were quite satisfied with the restrictive aspects of the marketing order as long as they were able, through their joint venture with Sullivan Inc., to enjoy the protections it conferred against additional competition. Having enjoyed the benefits of that order, petitioners are in a poor position now to contend that it was invalidly issued. Cf. *Arnett* v. *Kennedy*, No. 72–1118, decided April 16, 1974, slip op. 17–18 (opinion of Mr. Justice Rehnquist); *Fahey* v. *Mallonee*, 332 U.S. 245, 255–256.

Petitioners may at any time request the Secretary to reconsider and amend the marketing order to take account of its alleged anticompetitive effects. See 7 U.S.C. 608c(2)–(4), (17); 5 U.S.C. 553(e).[8] Thus far they have not done so. They cannot, however, at this point properly challenge the Secretary's issuance of that order nine years ago because of his failure to consider certain alleged anticompetitive effects—an issue that was not raised before him. Indeed, under 7 U.S.C. 608c(4), the Secretary was required to base his issuance of the order upon the evidence introduced at the hearing.

The cases upon which petitioners rely (Pet. 12–13), in which this Court held that an agency was required to consider antitrust issues in passing upon a proposed

[8] In judicial review following such an attempt to obtain modification of the order (if unsuccessful), the courts would presumably have the benefit of a more complete and appropriate record of the rulemaking proceeding than is before the courts in this case.

transaction under public interest standards, were all situations in which, unlike the present case, the antitrust points had been properly raised before the agency. We know of no decision of this Court holding that, even where an antitrust issue has not been raised before the agency, the latter's failure itself to consider it is a reason for invalidating the agency's action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1360

LEO BRAMSON AND MARVIN WELFELD, individually and as Trustees for themselves and the limited partners of Chiglades Farm, Ltd., *Petitioners*

v.

EARL L. BUTZ, Secretary of Agriculture, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY MEMORANDUM

---

1. In opposition to our petition, the federal respondents do not contest our view that the Secretary of Agriculture's regulation has devastatingly anti-competitive effects on the production and marketing of celery in Florida. There can be no real issue as to this result. The Florida Supreme Court pointed out as early as 1965, when it struck down a substantially identical state scheme, that it preserve a perpetual monopoly on celery production for those farmers who grew celery during the arbitrarily selected earlier period specified by the regulation.

The principal claim made by the federal respondents in answer to our antitrust argument is that the petitioners should not be permitted to assert their antitrust claim now since they did not raise it in the "rulemaking proceedings that preceded the adoption of the Marketing Order" in 1965 (Br. in Opp., p. 11).

It is true that the present petitioners did not appear in the rulemaking proceedings conducted by the Department of Agriculture in 1965. But it is simply wrong to assert that antitrust considerations were not "considered" because they had not "then been presented" to the Secretary (Br. in Opp., p. 11). The decision of the Department of Agriculture specifically stated with regard to one of the "exceptions" filed to the entire marketing program (30 *Fed. Reg.* 13708 (daily ed., October 28, 1965)):

> In their Exception No. 2 they assert, in substance, that the proposed order allegedly is unlawful because of similarity to the preceding Florida State program which was declared to be unlawful in *Rabin* v. *Conner,* 174 So. 2d 721, at page 725. The lawfulness of the Federal program, authority for which flows from the Agricultural Marketing Agreement Act of 1937, as amended, and from the Interstate Commerce powers of the Federal Constitution is, of course, unaffected by such State court ruling. The proposed Federal marketing order is authorized by the act and is supported by the hearing record. The exception, therefore, is denied.

The opinion of the Florida Supreme Court in *Rabin* v. *Conner,* reprinted as Appendix E to our petition, stated specifically that the Florida State scheme created "a controlled monopoly" (Pet., p. 89a). The Florida Supreme Court invalidated the state statute because, as it said, "The practical effect of this marketing order

is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny any other persons the right to participate in this lawful enterprise on any reasonably large scale basis, and to deny others the right to participate at all" (Pet., p. 87a).

Quite clearly, the challenge to the order based on the decision of the Florida Supreme Court tested the Secretary's power to confer on the Florida celery monopoly the power to exclude others from growing and marketing celery in that State. In a bare conclusionary statement that the order is "authorized by the act and is supported by the hearing record," the Secretary denied the "exception." Of course, those making the exception did not cite this Court's decision in *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, which was not decided until three years later. But the proposition that the proposed order created a monopoly for existing celery producers could not have been made more clearly—and could no more cavalierly have been disregarded.

2. Moreover, the 1965 rulemaking record refutes the assertion made the Solicitor General that this Marketing Order affects only the *sale* of celery and not its production. The decision issued by the Assistant Secretary of Agriculture regarding the proposed Marketing Order in 1965 stated (30 *Fed. Reg.* 13713 (daily ed., October 28, 1965)):

> As Florida celery producers have lost authority for continuing annual allotments to producers under the State program, proponents now support development of an annual allotment to producer type of program under Federal authority, *i.e.,* the act.
>
> * * *

> Instability of annual supplies for marketing has had direct effect on prices to celery farmers. Such direct effects disrupt orderly marketing and impair farmers' purchasing power and tend to destroy the value of agricultural assets in the Florida celery industry which support the national credit structure.
>
> The objectives of the marketing order are appropriate and the authorization of annual allotments is a proper means, under the act, for establishing more orderly marketing conditions by stabilizing annual marketable supplies of Florida celery.

In other words, the Department of Agriculture was saying in 1965 that in the interest of stabilizing the sale of celery in Florida, it would impose "allotment to producer" programs of the kind specifically forbidden by the Act. This law simply does not permit "allotments to producers," under any guise whatever, and it does not authorize such quotas even if they improve marketing conditions.

3. We note, finally that there is no merit whatever to the suggestion in the federal respondents' brief that the petitioners may not attack the anticompetitive consequences of the Act because they once, in total ignorance of their legal rights and on the basis of misrepresentations made to them, enjoyed its benefits. This Court finally and conclusively held in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 139-140 (1968), that the doctrine of *in pari delicto* "is not to be recognized as a defense to an antitrust action." Obviously, these petitioners have a very legitimate and proper desire to produce and market celery. So long as they were able to do so, they had no cause for complaint. Once the Marketing Order was applied

to exclude them from this lawful activity, their claim ripened and they could properly assert in this case all applicable invalidaties in the Marketing Order.

CONCLUSION

The issues presented by the present petition are not limited to the rights of these petitioners. If the production of celery is freed from the tentacles of the "controlled monopoly" imposed by the Secretary of Agriculture, other farmers will be able to produce that agricultural commodity for the benefit of consumers throughout the United States. Petitioners have, by this time, gone through several years of extended and expensive litigation to assert these rights. The Solicitor General's suggestion that the petitioners may now request the Secretary "to reconsider and amend the Marketing Order to take account of its alleged anticompetitive effects" mocks the orderly administrative process (particularly in view of the fact that the antitrust claims were fully asserted in the administrative proceedings in this case, see Pet. pp. 68a, 71a) and disserves the public interest. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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